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IN THE

Supreme Court of the United States

October Term, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, et al.,

Petitioners,

v.

KATHERINE JEFFRIES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a statute, which permits a one month lease between a private landlord and a Section 8 Existing Housing Program tenant and which permits only the Public Housing Agency to issue any notice to vacate following a landlord's decision to terminate the lease, create a property interest in the tenant to occupy the rental unit for the full lease term even though the lease is for a term longer than one month and permits at will termination upon thirty days notice in accordance with HUD regulations?

2. Where a private landlord exercises a mid-term at will termination option in his lease with a Section 8 Existing Housing Program tenant by giving thirty days' advance written notice, does the Public Housing Agency's subsequent issuance of a notice to vacate constitute sufficient "State action" to invoke the Due Process Clause?

3. Under Rule 19 of the Federal Rules of Civil Procedure, should class certification be denied for failure of a plaintiff class to name all of its private landlords as a defendant class in an action challenging the right of the landlords to enforce termination provisions in their Section 8 Existing Housing Program leases?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiffs-Appellees

Katherine Jeffries, Rose Hector, Eddie Maude Franklin and Belinda Clarke, on behalf of themselves and all others similarly situated

Defendants-Appellants

Georgia Residential Finance Authority; the Director of the Section 8 Existing Housing Program for the Georgia Residential Finance Authority and the Area Representative for Rockdale County, Georgia for the Georgia Residential Finance Authority, in their official capacities.

Defendants in the District Court also included the Secretary of the United States Department of Housing and Urban Development and the Director of the United States Department of Housing and Urban Development Atlanta Area Office, in their official capacities, and R. F. Taptich d/b/a Midtown Apartments. These Defendants did not participate in the proceeding in the Court of Appeals.

The instant petition to this Honorable Court for issuance of a writ of certiorari is presented on behalf of Defendants-Appellants Georgia Residential Finance Authority and the two officers of the Georgia Residential Finance Authority in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jeffries v. Georgia Residential Finance Authority*, 678 F. 2d 919 (11th Cir. 1982). The opinion of the District Court is reported as *Jeffries v. Georgia Residential Finance Authority*, 503 F. Supp. 615 (N. D. Ga. 1980). Three unreported opinions of the district court, the reported opinion of the district court, the reported opinion of the Court of Appeals and the Court of Appeals' judgment are all included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was rendered and entered on June 14, 1982. This petition for a writ of certiorari is filed within ninety

days of the Court of Appeals' judgment. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U. S. Constitution, Amend. XIV §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. §1437f(d):

(1) "Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that

* * *

(B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy;

* * *

(2) Each contract for an existing structure entered into under this section shall be for a term of not less than one month nor more than one hundred and eighty months."

* * *

Rule 19, 28 U. S. C.:

Joinder of Persons Needed for Just Adjudication.

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can

be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

24 C. F. R. §882.107(b):

"Term of Lease and of Housing Assistance Payments Contract. The Lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party. The term of the Lease shall be as agreed by the Family and the Owner, subject to the limitations of the preceding sentence. The term of the Contract shall be for the term of the Lease . . ."

STATEMENT OF THE CASE

This case arises from the mid-term termination of leases and the initiation of eviction proceedings by a private landlord, R. F. Taptich, against four tenants, the named Respondents, who were participants in the Section 8 Existing Housing Assistance Payments Program administered by the Georgia Residential Finance Authority ("GRFA") for the United States Department of Housing and Urban Development ("HUD"). In July, 1979, the Respondents initiated this class action against GRFA, against the Director of GRFA's Section 8 Program and the GRFA Rockdale County Section 8 Program Area

Administrator in their official capacities, against the Secretary of HUD and the Director of HUD's Atlanta office in their official capacities and against R. F. Taptich d/b/a Midtown Apartments. The district court's jurisdiction was invoked under 28 U. S. C. §1343(3) and 42 U. S. C. §1983 for an alleged deprivation of rights secured by the Constitution and laws of the United States. The Respondents sought declaratory and injunctive relief against the exercise of a thirty day at will termination provision contained in each of the leases entered into between GRFA Section 8 Existing Housing Program participants and their more than 2,000 private landlords. The Respondents also sought declaratory and injunctive relief against HUD and GRFA lease termination and eviction procedures which permitted the inclusion and exercise of such a provision in the leases.

The District Court certified a plaintiff class to include all GRFA Section 8 Existing Housing Program tenants whose leases provide for a minimum term of one year but permit termination upon thirty days notice and whose leases have been or are being terminated by their landlords. Deciding the issues on cross motions for summary judgment, the District Court entered a judgment for Respondents and granted them declaratory relief. Relying upon a provision in the Section 8 statute (42 U. S. C. §1437f[d][1][B]) which requires the Public Housing Agency ("PHA")—GRFA is a PHA—to send the notice to vacate, the Court held: (1) that sufficient state action exists in Section 8 Existing Program lease terminations and evictions to invoke the Due Process Clause; (2) that Respondents have a constitutionally protected property interest in continued occupancy of their rental units until the end of their lease terms, notwithstanding a lease clause complying with HUD regulations which permits at will mid-

term lease terminations upon thirty days' notice by either party; and (3) that landlords may only terminate Section 8 Existing Housing Program leases mid-term after a determination by GRFA that good cause exists.[1]

The Court of Appeals for the Eleventh Circuit affirmed the District Court decision.

(1) General description of the Section 8 Existing Housing Program

The Section 8 Existing Housing Program was established by Congress pursuant to its enactment of Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. 42 U. S. C. §1437f. The Program provides rent subsidies on behalf of tenants who rent from private landlords. Implementing regulations promulgated by HUD are found at 24 C. F. R. Part 882.

The Section 8 Existing Housing Program is administered either by HUD or by a PHA like GRFA. GRFA issues Certificates of Participation to families who are responsible for finding existing housing units on the private market which meet their needs and desires and which meet Program requirements, such as minimum housing quality standards and rent limitations. The family is provided mobility under the Program in that the subsidy attaches to the family rather than the rental unit, thus enabling the family to use its Certificate to locate and move into another unit.

[1] The District Court also held that the HUD regulation governing eviction (24 C.F.R. §882.215) fatally conflicts with the Section 8 statute by failing to require the PHA to send the notice to vacate. Petitioners did not appeal this holding in the Court of Appeals. However, Petitioners did appeal the District Court's holding that by requiring the PHA to send the notice to vacate, the statute prohibits mid-term lease terminations except for good cause.

The landlord and family enter into a form Lease Agreement which has been approved by HUD. The landlord and GRFA enter into an agreement referred to as the Housing Assistance Payments Contract ("HAP Contract"), which provides for rent subsidy payments by GRFA to the landlord.

Lease terminations and evictions in the Section 8 Existing Housing Program will be discussed in the section of this petition entitled "Reasons for Granting the Writ."

(2) **The named Respondents**

The four named Respondents used their Certificates in the GRFA Section 8 Program to rent apartments from a private landlord, R. F. Taptich. Each of the leases provided for termination by either party upon thirty days advance written notice, as permitted by HUD regulations. Record, pp. 1567, 1568. After several months, Mr. Taptich gave such notice and also stated his intent to discontinue participation in the Section 8 Existing Program. Record, p. 1578. The subsequent initiation of eviction proceedings by Mr. Taptich against two of the named Respondents led to the filing of this action. After offering a hearing which was refused by Respondents, GRFA approved the lease terminations on the grounds that Mr. Taptich properly terminated the leases by giving the requisite thirty days advance written notice. Record, pp. 1688, 1689, 1700. By agreement of the parties, however, the named Respondents were permitted to stay in their rental units until their lease terms expired. The last lease expired on March 31, 1980, three months before the District Court entered a preliminary injunction order on behalf of Respondents. Record, p. 1567. None of the leases were renewed.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals' decision sets an important and far-reaching precedent in entitlement law by finding a property interest protected by the Due Process Clause arising out of an agreement between private parties such that the agreement may not be terminated pursuant to its terms. The decision is contrary to the well-established construction of the Section 8 Statute by HUD, the agency charged with the statute's administration. Furthermore, the decision is in direct conflict with *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773 (1980) and *Flamm v. Real Blt, Inc.*, 424 U. S. 1313 (Rehnquist, Circuit Justice, 1976).

The Court of Appeals acknowledged that the Section 8 Existing Housing Program statute permits a lease between a private landlord and a Section 8 tenant for a term as short as one month. 42 U. S. C. §1437f(d)(2). Therefore, the decision by the Court that the Section 8 statute prohibits the at will termination of a longer lease on thirty days notice pursuant to its terms and creates a constitutionally protected property interest for the full lease term is a far-reaching decision in entitlements law.

The Court found the source of the entitlement to be contained in 42 U. S. C. §1437f(d)(1)(B) which states "the agency shall have the right to give the notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." [1]

---

[1] Section 326(e) of the Omnibus Reconciliation Act of 1981 provided for the amendment of 42 U. S. C. §1437(d)(1)(B):

> (1) Section 8(d)(1)(B) of the United States Housing Act of 1937 is amended to read as follows:
>
> "(B) (i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the Secretary; and

The Court reasoned that requiring the PHA to send the notice to vacate would be meaningless unless Congress intended to impose a good cause requirement for lease terminations and evictions.[8]

The reading-in of the good cause requirement is strained and, as applied, conflicts with the statute which provides for a minimum entitlement of one month and HUD regulations which permit one-to-three year leases terminable at will upon thirty days notice. If a "property" right has been taken in this litigation, it is the right of the landlord to be out of the Program within the statutory time of one month.

Furthermore, the reading-in of the good cause requirement is not the only meaningful construction of 42 U. S. C. §1437f(d)(1)(B). When a lease is terminated, before GRFA sends a notice to vacate it conducts a review which permits it to determine whether the lease has been properly terminated under the thirty day notice provision, or if not, on the basis of other grounds sufficient under the lease. GRFA can counsel the landlord and tenant and perhaps resolve their differences. If GRFA authorizes the proposed eviction and sends the notice to vacate, it can meet with the tenant and aid the tenant in locating other

"(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;".

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

Although the statutory amendment also permits a lease for a one month term (*see* 42 U. S. C. §1437f[d][2]), Petitioners' arguments will exclusively address the pre-amendment statutory language governing leases entered into prior to October 1, 1981. Although new GRFA leases have been modified to comply with the amended statute, many of the original leases are still in effect.

[8] The United States Court of Appeals for the Fourth Circuit also adopted this view and imposed a good cause requirement for end of lease term evictions. *Swann v. Gastonia Housing Authority*, 375 F. 2d 1342 (4th Cir. 1982).

housing on the private market where the tenant can continue Program participation. By sending the notice to vacate GRFA also knows to stop making rent subsidy payments to the landlord after the tenant vacates. The PHA review of lease terminations required by 42 U. S. C. §1437f(d)(1)(B) is not meaningless absent a good cause requirement.

The Court of Appeals also relied upon 42 U. S. C. §1437f (e)(2) which gives exclusive authority to terminate tenancies to the landlords in the other two Section 8 programs, the new construction program and the substantial rehabilitation program. The Court reasoned that Congress must have intended a good cause requirement in the Existing Housing Program by providing a distinct termination mechanism. It is worthy, of note, however, that HUD in looking at the statutory schemes for each of the three Section 8 programs promulgated regulations which required good cause for mid-term lease termination in the other two programs and which did not provide such a requirement in the Existing Housing Program. 24 C. F. R. §880.607; 24 C. F. R. §881.607. Perhaps this was in recognition of the need to attract private landlords into the Existing Program by offering them an "out" and in recognition of the longer contractual terms and the greater benefits accorded the landlords in the other two programs which arguably confer them with quasi-public status carrying good cause requirements in their terminations of tenants' leases.

The Court also relied upon the legislative history of the recent amendment to the Section 8 Existing Housing Program Statute (see footnote 2 for the language of the amendment) which eliminates the requirement that the PHA send the notice to vacate and which requires leases

entered into after October 1, 1981 to contain a provision requiring good cause for mid-term lease terminations. The statements made by the Conferees, however, do not disclose an intent that prior leases could be terminated mid-term only for cause. H. R. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 694-95, reprinted in [1981] U. S. Code Cong. & Ad. News 1010, 1053. In fact, by requiring the insertion of the provision in prospective leases, there was a recognition that in order for such a good cause termination requirement to be fairly imposed upon private landlords, the requirement must appear in the contract documents to which the landlords are parties. It is fundamentally unfair for a Court to change the terms of the private landlords' contractual commitments, especially where the statutory entitlement sources found by the Court in the pre-amendment language is vague at best.[4]

HUD Regulation 24 C. F. R. §882.107(b) [5] clearly provides for leases with one to three year terms which are terminable at will by either party upon thirty days notice. This regulation implements 42 U. S. C. §1437f(d)(2) (providing for a HAP contract and implicitly a lease for a

[4] This Court's recent opinion in *Pennhurst State School v. Halderman*, 451 U. S. 1 (1981) has application to the obligations and rights of these landlords. In *Pennhurst* the Supreme Court refused to impose retroactive conditions upon a state which voluntarily began participation in a federal grant program where those conditions were not placed upon the state explicitly by Congress. Landlords in this case who entered the Program with valid expectations they could terminate leases at will on thirty days written notice should have been given the same consideration as the states in *Pennhurst*.

[5] This regulation has been recently amended to comply with the statutory amendment set out in footnote 2. It no longer permits mid-term at will lease termination provisions. Also in compliance with the statutory amendment, the amended eviction regulation (24 C. F. R. §882.215) requires that leases entered into after October 1, 1981 contain a provision prohibiting mid-term termination except for cause. 47 Fed. Reg. 33497 (August 3, 1982).

term as short as one month) by permitting a longer lease which can be terminated by either party upon thirty days written notice without cause and with whose termination the HAP Contract would also terminate. Such a lease and HAP Contract comply with Congressional approval of a one-month term while providing more certainty and fewer administrative headaches than a series of one-month leases and HAP contracts. In fact, HUD considered and rejected imposing a good cause requirement on lease terminations and evictions. See 41 Fed. Reg. 16924 (April 22, 1976) and 41 Fed. Reg. 43330 (Sept. 30, 1976).

In 1976, HUD approved as complying with Program requirements GRFA's Standard Lease Form which provided for termination upon thirty days advance written notice by either party.[6] Record, p. 1577. And in 1977 HUD, by Notice 77-13 (PHA) sent to GRFA and other PHAs, encouraged the use of such a provision in order to attract private landlords into the Section 8 Existing Housing Program. Record, pp. 1573, 2987. HUD recognized that the Section 8 Program goals of aiding lower income families in obtaining a decent place to live and promoting economically mixed housing could only be accomplished if private landlords entered the Program. 42 U. S. C. §1437*f*(a).

The Court of Appeals erred by failing to accord deference to HUD regulation 24 C. F. R. §882.107 which was promulgated contemporaneously with the Section 8 Statute and which has been the long-standing construction of Section 8 statutory requirements for lease durations and

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[6] Under Georgia law a thirty day at will termination clause in a lease is enforceable. *Moon v. Daniel*, 64 Ga. App. 363, 364, 13 S. E. 2d 187 (1941); Dawkins, *Georgia Landlord & Tenant-Breach & Remedies* §5-4 (1979).

mid-term lease terminations. See *Udall v. Tallman*, 380 U. S. 1, 16 (1964).

Finally, the Court of Appeals' decision conflicts with this Court's analysis in *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773 (1980), which holds that nursing home patients do not have a constitutionally protected property interest in continued residence at a particular facility which would entitle them to a hearing prior to decertification of the facility by HEW and DPW. In reaching its decision, this Court looked to "the contours of the right conferred by the statutes and regulations." *Id.*, at 786.

The statute and regulations in the instant case compel even more strongly a finding of no entitlement to continued occupancy. Unlike the Medicaid provisions which expressly prohibit a nursing home's discharge of a patient, once admitted, for reasons other than those excepted by the regulations, the Section 8 Existing Housing Program statute does not provide for a continuing landlord-tenant relationship once a lease is executed. On the contrary, the statute permits a one month lease and the regulations implementing it permit a lease that can be terminated at will by either party upon thirty days written notice. *O'Bannon* held that since decertification does not reduce or terminate a patient's financial assistance but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in benefits are irrelevant. Upon the termination of a Section 8 Existing Housing Program lease, the tenant does not lose the right to continue participation in the Program. The tenant is merely required to locate and continue assistance in a different rental unit. 24 C. F. R. §882.103; 41 Fed. Reg. §43330 (Sept. 30, 1976).

The Court of Appeals' decision also directly conflicts with *Flamm v. Real-Blt, Inc.*, 424 U. S. 1313 (Rehnquist, Circuit Justice, 1976). Justice Rehnquist denied a tenant applicant's motion to stay the judgment of the Supreme Court of Montana [1] for the reason that a thirty day termination provision contained in her federally subsidized low-income housing project lease made it unnecessary to reach her contentions that her landlord was subject to Due Process Clause limitations before evicting her. The tenant contended that the housing project was so intertwined with the Federal Government that its action in evicting her was subject to the limitations of the Due Process Clause of the Fifth Amendment. She further contended that these limitations entitled her to a statement of reasons amounting to a showing of good cause and to a hearing before she could be evicted. The Supreme Court of Montana failed to find sufficient government involvement to invoke the Due Process Clause. However, Justice Rehnquist relied upon the thirty day lease termination provision to deny the stay, stating:

> "In view of the express provision of the lease, it seems to me that this Court, if it were to hear and decide the case, would find it unnecessary to reach the question of whether respondent's activities are subject to the Due Process Clause of the Fifth Amendment . . ."

Id., at 1314.

2. The Court of Appeals' finding of state action in a PHA's nondiscretionary, ministerial act of sending a notice to vacate which constitutes mere acquiescence to a private party's action and which carries with it no depriving attributes conflicts with applicable decisions of this Court.

The Court of Appeals based its finding of state action

[1] *Flamm v. Real-Blt, Inc.*, 168 Mont. 351, 543 P. 2d 190 (1975), *cert. denied*, 425 U. S. 941 (1976).

in part upon the intertwining relationship between GRFA and the private landlord who has actually acted. It stated that the privity of contract and conferring of mutual benefits (between the private landlord and GRFA) results in a concert of action sufficient to be designated state action under *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961). In *Jackson v. Metropolitan Edison Co.*, 419 U. S. 345 (1974), however, the Supreme Court discussed the narrowness of the *Burton* holding, stating that "differences in circumstances beget differences in law, limiting the actual holding to lessees of public property." *Jackson, supra*, at 726.

Like the state regulated public utility in *Jackson*, the Section 8 Existing Housing Program landlord is a private entity or person who does not lease business property from GRFA or the State. GRFA derives no profit from the landlord's business and is not "in any realistic sense a partner or a joint venturer" (*see Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 176-177 [1972]) in the landlord's enterprise of renting dwelling units. The private landlord who elects to rent to a Section 8 tenant carries out traditional landlord responsibilities and receives no mortgage subsidies or monetary benefit from GRFA other than rent subsidy payments, which are conditioned upon the family's occupancy and end when the family elects to move elsewhere. He receives no GRFA guarantee that he will be paid the family portion of the rent. Record, p. 2978. He cannot even receive vacancy payments from GRFA where the tenant properly terminates the lease. 24 C. F. R. §882.105. By participating in the Section 8 Existing Housing Program, the landlord does not dilute his private status.

In *Jackson, supra*, this Court held there is no state

action when a private party merely "exercises a choice allowed by State law where the initiative comes from it and not from the State." Mere state acquiescence of a private action, as opposed to State compulsion of it, does not convert the action to state action. *Id.*, at 357; *See also, Flagg Brothers, Inc. v. Brooks*, 436 U. S. 149, 164 (1978). Although GRFA provides its Certificate holders and the private landlords they select a lease which permits termination by either party upon thirty days notice, it does not compel the use of such a clause by the landlord. In furnishing the lease, GRFA's role is comparable to that of the state regulatory commission in approving the termination procedure used by the utility in *Jackson* and to that of the state legislature in permitting a warehouseman's private sale of goods entrusted to him by a bailor in *Flagg Brothers, Inc.*

Nor does the statutory requirement that the landlord inform GRFA of lease termination and that GRFA send the notice to vacate convert to state action the landlord's private action of exercising the thirty day clause and later filing of eviction proceedings. GRFA has no discretion to prevent the lease termination where the landlord has exercised the thirty day clause. GRFA can only determine the presence of a notice of termination and the lapse of time and provide counseling.

Furthermore GRFA's issuance of the notice to vacate (at the landlord's instigation) is not the act causing dispossession. It does not have the depriving attributes of the government action in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) or *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). To dispossess under Georgia law, the landlord, without GRFA, must prevail in adversary

proceedings before a court may issue a writ of possession. Ga. Code Ann. Ch. 61-3. GRFA's ministerial act has no meaning at all unless the landlord invokes judicial remedies. GRFA does not perform the overt act causing loss of occupancy.

3. The Court of Appeals construed an important federal procedural rule, Rule 19 of the Federal Rules of Civil Procedure, in an unduly restrictive manner to deny its protections to thousands of private landlords participating in the Section 8 Existing Housing Program. The Court misapplied *National Licorice Co. v. NLRB*, 309 U. S. 350 (1940) to hold that the Rule does not protect parties to a contract whose interests could be adversely affected by a lawsuit involving a "public" right.

The Respondent class was certified to include GRFA Section 8 participants whose leases contain a thirty day termination provision and whose landlords have terminated or are terminating their leases. For every class member is a private landlord who has entered into a lease agreement with that class member. The lawsuit attacks the right of GRFA Section 8 landlords to exercise the thirty day termination provision in their leases. However, the only landlord named as a defendant was the named Respondents' landlord, Mr. Taptich. He participated minimally in the litigation in the District Court and not at all in the Court of Appeals.*

In holding that these landlords are not indispensable parties under Rule 19, the Court of Appeals noted the

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* Although the opinion issued by the Court of Appeals refers to arguments presented by the "owners", there were no landlords presenting arguments in the Court of Appeals. Presumably, the Court intended a reference to GRFA. However, please note that GRFA is in no sense an owner or landlord of the private units rented by Section 8 tenants.

Respondents' arguments that the landlords had no part in drafting the contract documents to which they were parties and that Rule 19 exempts class actions from its provisions. Such broad exceptions from the Rule's provisions conflicts with its purpose. Although Rule 19(d) states that Rule 19 is subject to Rule 23 governing class actions, it should be clear from the rules that this exemption exists only with respect to indispensable party arguments made in regard to those represented by the class.

Rule 19 exists to prevent the issuance of an Order fundamentally affecting the contractual rights of parties not before the Court. Whether the landlords had a part in drafting the terms of the HUD-approved leases they executed is irrelevant. Instead, it is important that each landlord after reading the leases and HAP contracts could have chosen to decline to sign the contracts and make their rental units available. By executing the contracts, the landlords elected to enter the Program on the basis of understandings of their rights under the terms of those contracts.

The Court of Appeals stated that the holding of the District Court does not in a practical sense prejudicially affect the interests of the landlords, that the absent landlords' interests might not conflict with the tenants' claims and that the suit does not challenge the propriety of the actions of the named landlords or absent landlords.

By definition of the Respondent class, the absent landlords include those landlords who have terminated or are terminating tenants' leases mid-term by use of the thirty day termination provision. Therefore, the Respondents' entitlement claim directly conflicts with the interests of the absent landlords. The Respondents challenged the propriety of and sought relief against the absent land-

lords' exercise of the thirty day clauses in their leases. The Judgment rendered below as a practical matter has had the effect of destroying the landlord's contractual rights without due process. *See Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U. S. 102, 123 (1968). Under the Court of Appeals' holding, GRFA may not send a notice to vacate following an absent landlord's termination of a tenant's lease until GRFA has determined that good cause exists. Sending the notice to vacate is a prerequisite to filing dispossessory proceedings in Georgia. *See*, Ga. Code Ann. Ch. 61-3. Also, in a dispossessory proceeding in Georgia courts, the Court of Appeals' Judgment will be noted and good cause will be viewed as a prerequisite to the absent landlord's right to evict the tenant. *See, e.g., Milam v. Housing Authority of Columbus*, 129 Ga. App. 188, 199 S. E. 2d 107 (1973); *Jenkins v. Allen Temple Development*, 127 Ga. App. 61, 192 S. E. 2d 714 (1972). Thus, the landlords' ability to protect their property interest in their leases has been impaired as a practical matter.

Other Circuit Courts of Appeal have held that when litigation affects contractual rights or there is otherwise a common judicial link, all parties to the instrument or who are so affected are necessary parties. *See Neal v. System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965) (per then-Judge Blackmun). A specific application of this rule is that of the landlord or tenant whose interests are at stake. *Lomayaktewa v. Hathaway*, 520 F. 2d 1324 (9th Cir. 1975); *cf. Sierra Club v. Hathaway*, 579 F. 2d 1162, 1166 (9th Cir. 1978) (lessees). *See also, Commonwealth Trust Co. of Pittsburg v. Smith*, 266 U. S. 152 (1924).

The Court of Appeals also held that since the lawsuit seeks vindication of a public right, the private landlords

who could be adversely affected do not thereby become indispensable parties. In so holding it misapplied *National Licorice Co. v. NLRB*, 309 U. S. 350 (1940). There the Supreme Court upheld the National Labor Relations Board's order that an employer desist from taking benefit from contracts with its employees which were in violation of the National Labor Relations Act, notwithstanding the absence from the Board's proceeding of the employees who signed the contracts. The Supreme Court, however, carefully noted that the Board's order only prevented the employer from carrying out contract terms which impose illegal restraints upon the employees' rights to organize and bargain collectively. Significantly, the Supreme Court stated that the Board's order does not foreclose the employees from taking any judicial action upon their contracts or prejudge their rights in the event of such litigation. *Id.*, at 365. In contrast, as discussed above, the landlord's contractual rights have been foreclosed and prejudged as a practical matter.

The Court of Appeals also made much of its determination that the indispensable party objection was not timely raised. Petitioners had pointed out to the Court in their appellate briefs and at oral argument, however, that they raised the issue of joinder in the District Court in their Answer to the Complaint and subsequently in briefs in opposition to Respondents' motions concerning class certification and in a brief supporting Petitioners' Rule 12(h)(2) motion. Record, pp. 160-163, 359, 541, 542, 1129.

Since GRFA's interests are not co-extensive with those of the private landlords, arguments may have been lost by nonjoinder of landlords. An active landlord litigant might have raised and developed an issue such as uncon-

stitutional confiscation of private property to rebut Plaintiffs' entitlement claim.

Since at this late stage it is not feasible to join the landlords individually or as a class, Petitioners would urge that the class action aspects of the lawsuit be dismissed. Although the case would become moot upon such dismissal inasmuch as the named Respondent's leases have expired and have not been renewed, the fact is that they were forewarned of the need to satisfy Rule 19 by the first defensive pleading filed.

This decision sets an important precedent for the application of Rule 19 to absent landlords in future litigation brought by Section 8 Existing Housing Program tenants. It denies thousands of landlords the protections accorded by the Rule. Beyond impacting upon Section 8 litigation, the decision sets a precedent to deprive absent parties of Rule 19 protections in class action litigation where the absent parties are not represented by the class and have interests adverse to the class. Furthermore, the holding that contracting parties whose rights under a contract are being attacked are not indispensable in litigation seeking vindication of a "public" right has far-reaching application.

CONCLUSION

For all of the reasons stated the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case should be granted and the decision below reversed by this Honorable Court.

Respectfully submitted,

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APPENDIX A

Katherine JEFFRIES, et al.,
Plaintiffs-Appellees,

v.

GEORGIA RESIDENTIAL FINANCE AUTHORITY,
Harriet J. Macklin, etc.,
Defendants-Appellants.

No. 81-7389.

United States Court of Appeals,
Eleventh Circuit.

June 14, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before INGRAHAM, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

This appeal involves a review of the constitutionality of eviction procedures administered by the Georgia Residential Finance Authority (GRFA) for tenants receiving benefits under the Section 8 Existing Housing Assistance Payments (HAP) Program of the U.S. Department of Housing and Urban Development (HUD). We affirm.

BACKGROUNL

A. Proceedings Below

This case arose from the mid-term termination of leases and the initiation of eviction proceedings by a private landlord, Taptich, against his tenants, who are participants in the Section 8 Existing HAP program administered for HUD by GRFA. In July, 1979, the tenants filed

this class action suit against GRFA, the Director of GRFA's Section 8 program, the GRFA Rockdale County Section 8 Program Area Administrator, the Secretary of HUD, and the Director of HUD's Atlanta office, in their official capacities, and against Taptich. In seeking declaratory and injunctive relief, plaintiffs challenged a HUD regulation, 24 C.F.R. § 882.215 (1981), as violative of the fourteenth amendment due process clause. This regulation sets out eviction procedures for tenants receiving benefits under the Section 8 program.

The district court certified a plaintiff class which included Section 8 Existing HAP tenants with minimum one-year term leases and thirty-day notice termination clauses and who were threatened with mid-term lease terminations. The district court granted declaratory relief to the tenants and held: (1) that the lease terminations and evictions comprised sufficient state action to invoke the fourteenth amendment's due process clause, despite the involvement of the private landloard; (2) that the Section 8 tenants had a constitutionally protected property interest in continued occupancy of their rental units throughout their lease term, an interest which the government could not deprive them of without affording them due process of law; and (3) that landlord-initiated mid-term lease terminations could occur only after GRFA found good cause. *Jeffries v. Georgia Residential Finance Authority*, 503 F.Supp. 610 (N.D. Ga.1980).

B. The Section 8 Existing HAP Program

In enacting Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, Congress established the Section 8 Existing Housing Assistance Payments Program,

42 U.S.C. § 1437f (1978), which supplies rent subsidies. The purpose of the Section 8 program is to aid lower income families in obtaining a decent place to live and to promote economically mixed housing. 42 U.S.C. § 1437f(a). The program is implemented by regulations at 24 C.F.R. Part 882.

HUD and a local public housing agency (PHA) such as GRFA administer the Section 8 program. 24 C.F.R. § 882.102. GRFA issues a certificate of family participation to eligible participants who locate a privately owned dwelling that complies with the housing quality standards approvied by HUD. 24 C.F.R. §§ 882.102, 882.103(a), 882.109. The certificate holder then executes a lease with the owner of the private dwelling. GRFA then executes a HAP contract with the owner which covers contract rent, family contributions to rent, assistance payments, maintenance, operations, inspections, and evictions, among other privileges.

Under the lease agreement between the landlord and the tenant, the tenant pays a certain percentage of the rent and utilities in proportion to the tenant's income. 42 U.S.C. § 1437f(c)(3); 24 C.F.R. § 889.105. GRFA pays the balance of the rent directly to the landlord. GRFA must approve the lease. The term of each lease must be not less than one month nor more than 180 months. 42 U.S.C. § 1437f(d)(2). All GRFA leases are for twelve, twenty-four, or thirty-six months, but contain a clause that allows termination upon thirty-days written notice by either the landlord or the tenant at will.

The HUD regulation governing evictions of Section 8 existing housing tenants, 24 C.F.R. § 882.215, authorized the landlord to notify the tenant of the proposed eviction. Under this regulation's implementing statute, however,

Congress provided that assistance payments contracts between a PHA and an owner of existing housing must provide that "the agency shall have the *sole* right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. § 1437f(d)(1)(B) (emphasis added).[1] The district court thus declared the regulation void for conflicting with the statute because it permitted a private landlord to unilaterally terminate subsidies without good cause.

Appellees (tenants) are GRFA certified program participants. Each tenant entered into a lease with the Midtown Apartments in Conyers, Georgia, for a term of twelve months, subject to a provision allowing either the landlord or the tenant to terminate the lease upon giving thirty-days written notice. Appellant Taptich (owner), the owner of Midtown Apartments, exercised his rights under the thirty-day termination clause and gave notice to the tenants and GRFA that he intended to terminate their leases. GRFA provided no administrative hearing or other relief with respect to the proposed terminations.

II. ISSUES PRESENTED

We must determine (1) whether the participation of the statutorily-created state agency, GRFA, in Section 8 ter-

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[1] The statutory eviction provision for Section 8 existing housing tenants differs from that for new or substantially rehabilitated housing tenants. In the latter two Section 8 programs, the

> contract between the Secretary and the owner . . . shall provide that all ownership, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or approved by the Secretary, with which the owner may contract for the performance of such responsibilities).

42 U.S.C. § 1437f(e)(2).

mination and eviction procedures, constitutes sufficient state action to implicate the due process clause of the fourteenth amendment; (2) whether Section 8 tenants have a property interest in the continued occupancy of their apartments during the terms of their leases so that their private landlords cannot evict them mid-term absent good cause despite a lease provision permitting termination at will be either party on thirty-days written notice; and (3) whether certification of a defendant class of Section 8 landlords is required because the properly certified tenant class challenges termination and eviction provisions in contracts to which the landlords are parties.

III. STATE ACTION

[1] It is well settled that the fourteenth amendment proscription against deprivations of property without due process of law reaches only government action and does not inhibit the conduct of purely private persons in their ordinary activities. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 452, 42 L.Ed.2d 477 (1974). We must therefore determine whether the involvement of GRFA in the Section 8 eviction procedure can be deemed "state action."

The question whether certain conduct is attributable to a private person or is tantamount to state action is frequently difficult to ascertain, especially where "the hand of the government is clear, but its path toward contract with the individual clouded by the action of a private individual." *Jeffries*, 503 F.Supp. at 613; *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). "Only by sifting facts and weighing circumstances

can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722, 81 S.Ct. at 860.

While the Supreme Court has refused to fashion a precise formula for ascertaining state action, several principles have emerged from the Court's decisions on this subject. First, the state, "in any of its manifestations," must be significantly involved in the private conduct. *Burton*, 365 U.S. at 722, 81 S.Ct. at 860; *Moose Lodge*, 407 U.S. at 173, 92 S.Ct. at 1971. The mere fact that a private entity is subject to extensive and detailed government regulation is not controlling. *Jackson*, 419 U.S. at 350, 95 S.Ct. at 453. Similarly, granting a license or providing essential services is an instance of insignificant state involvement. *Moose Lodge*, 407 U.S. at 173, 177, 92 S.Ct. at 1971, 1973.

[2] The relevant inquiry is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453. The private citizen's conduct may be attributable to the state where the government affirmatively facilitates, encourages, or authorizes the objectionable practice. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 166, 98 S.Ct. 1729, 1738, 56 L.Ed.2d 185 (1978) (warehousemen's sale pursuant to state law providing procedure for conversion of lien to good title is not state action where state has not compelled sale of bailor's goods, but merely has announced circumstances where courts will not interfere with private sale); *Jackson*, 419 U.S. at 357, 95 S.Ct. at 456 (state not sufficiently connected with challenged termination of service by private utility where utility initiated practice

which state merely approved but did not order); *Moose Lodge*, 407 U.S. at 173, 92 S.Ct. at 1971 (state action exists where government overtly or covertly encourages practice, such as where existence of state law is tantamount to state having commanded the result); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 359 (5th Cir. 1977) (no federal action in nonjudicial foreclosure of HUD-assisted mortgate where HUD mortgage form authorized foreclosure by private power of sale as well as by judicial foreclosure).

[3] The owners urge that the present case is devoid of any significant state involvement, whether in the form of a "symbiotic relationship" between landlord and state, as in the lease arrangement in *Burton*, or as manifested by governmental compulsion to engage in the challenged act, rather than mere acquiescence in private conduct as in *Flagg Brothers*, *Jackson* and *Roberts*. The owners argue that GRFA does not compel the landlord to exercise his rights under the thirty-day clause; the private landlord acts on his own initiative. By furnishing the lease which permits termination by another party upon giving notice, GRFA merely acquiesces in the landlord's decision to exercise the choice provided. The owners assert that GRFA's issuance of a notice to vacate is a purely ministerial act which does not comprise the overt act causing eviction. The owners also contend that the leasing of rental units by private landlords to Section 8 tenants is not a "public" or "sovereign function" which gives rise to a finding of state action. Finally, the owners assert that the thirty-day termination clause arises solely from a bargain between the landlord and the Section 8 tenant.

We agree with the district court that GRFA "has so far insinuated itself with the private owner in carrying out the challenged eviction procedure" that the nexus between

the state and the private action "is both firm and close." The evictions therefore are not purely private and without constitutional ramifications. We recognize that intimate government involvement in the form of significant regulation or provision of benefits will not necessarily mandate a finding of state action absent a close nexus between the state and the eviction of the Section 8 tenants. *Jackson*, 419 U.S. at 350-51, 95 S.Ct. at 453; *Joy v. Daniels*, 479 F.2d 1236, 1238 & n.3 (4th Cir. 1973). We hold, however, that these factors and other evidence of state involvement, support the district court's conclusion that such a nexus exists.

As the district court noted, both the Housing Act and its legislative history indicate tenancy termination and eviction under the Section 8 Existing Housing Program implicate state action. The clear import of the statutory language establishes responsibility for lease termination and eviction with the state. The statute explicitly provides that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. § 1437f(d)(1)(B). The PHA herein, GRFA, is a statutorily-created instrumentality of state government. In enacting the 1974 amendment, Congress stated its intent "that primary responsibility for carrying out the leasing program should be vested in public housing agencies." S.Rep.No. 693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong., & Ad.News 4273, 4314. By speaking of the "discretion" invested in the public housing agencies in making certain important decisions under Section 8, and by expressing a "requirement that a public housing agency has the *right* to make the determination in question," Congress made clear that the role it envisioned for the PHAs under the Act is not of the ministerial

nature urged by the owners.

In addition to the statute's explicit requirement of state action for effectuating evictions of Section 8 tenants, GRFA plays a pervasive role in the administration and operation of the Section 8 program. GRFA determines the eligibility of prospective tenants, 24 C.F.R. § 882.116(c), informs landlords and tenants of their rights and responsibilities, 24 C.F.R. § 882.116(f), reviews and approves leases between landlords and tenants, 24 C.F.R. § 882.116(j), inspects and certifies housing as meeting HUD standards, 24 C.F.R. § 882.116(o), and authorizes evictions. 24 C.F.R. § 882.116(p).

Further, GRFA maintains a direct contractual relationship with the Section 8 landlord who benefits thereby both from the rent subsidy payments and the assurance that he will be reimbursed for portions of the rent if the tenant vacates the unit in violation of the lease or for other unpaid amounts owing under the lease. 42 U.S.C. § 1437f (b)(1); 24 C.F.R. §§ 882.105(b), 882.112(d). This contractual relationship benefits the state as well by providing housing for low income families who could not otherwise afford a decent place to live without assistance. We agree with the district court that "[t]his privity of contract and conferring of mutual benefits results in a concert of action sufficient to be designated state action under *Burton*."

This case also is distinguishable from *Flagg*, which was marked by the total absence of overt official involvement, and from *Jackson*, where the state's only involvement was to approve a termination plan. In this case, the state may veto the private landlord's request to terminate occupancy, but otherwise must take the affirmative step which is the prerequisite to legal eviction. The owner's reliance on

Roberts also is misplaced. In that case, the private mortgagee controlled the exercise of its power of foreclosure and exercised that power on its own intiative and independently of the government. The government did not prescribe the method of foreclosure and did not regulate that process in any manner. On the other hand, the instant case involves governmental defendants who authorize the eviction and issue the notice to vacate, and implicates actual and mandatory state action. Not only does the state regulate the exercise of rights under the thirty-day clause, but a private party may not complete eviction without state approval.

Finally, the circumstances of the present case meet the "public functions" test. *See Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (passageways in privately-owned shopping center not public places, nor is operation of privately-owned shopping center an exclusive governmental function); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (administration of private discriminatory trust by public officials involves state action); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (streets in company-owned town held public, even though privately-owned). GRFA's purpose is to build, rehabilitate, finance, and lease housing by administering the Section 8 program. In authorizing evictions, the authority thus acts pursuant to its public function. Moreover, the former Fifth Circuit has acknowledged that housing is a governmental function. *Roberts*, 556 F.2d at 359. "[W]hen a specific governmental function is carried out by heavily subsidized private firms whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration

of state action fairly attaches." 556 F.2d at 359 (citing *McQueen v. Druker*, 317 F.Supp. 1122 (D.Mass.1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971)).

IV. THE SUBSTANTIVE PROPERTY INTEREST

[4] The district court held that Section 8 existing housing tenants have a constitutionally protected property interest in the continued occupancy of their rental units until the end of their lease term. The court held that despite the thirty-day termination clause, private landlords may only terminate tenants' leases mid-term upon a determination by GRFA that "good cause" exists. We affirm and thereby join those courts which have found that Section 8 tenants have constitutionally protected property rights in an expectation of continued occupancy and receipt of rent and utility subsidies. *See Swann v. Gastonia Housing Authority*, 502 F.Supp. 362, 365 (W.D. N.C.1980), *aff'd in part*, 675 F.2d 1342 (4th Cir. 1982); *Brezina v. Dowdall*, 472 F.Supp. 82, 85 (W.D.Ill.1979).

The owners contend that the finding of such an entitlement contravenes the Section 8 statute, HUD regulations, the lease, and state law. They note that the Section 8 statute authorises a lease term as short as one month and that implementing HUD regulations, which are entitled to deference, provide for one to three year leases. In addition, the owners point out that the regulations permit mid-term termination by either party upon thirty-days written notice. The tenants' leases also provide for termination by either party upon thirty-days notice, and Georgia courts have interpreted similar provisions to permit termination by either party at will, without cause.

The tenants may claim procedural due process rights under the due process clause if they have a substantive

property interest in continued occupancy. *Joy*, 479 F.2d at 1239; *Swann*, 502 F.Supp. at 365; *see Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . ." *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. A property interest in a benefit may be established though existing rules or mutually explicit understandings that support the claim of entitlement to the benefit, or through the construction of statutes and regulations which define and delimit the interest asserted. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). We thus review the applicable statutes and regulations in evaluating the due process rights of appellees.

[5] It is well settled that a protected property interest arises where a government benefit may be withdrawn only for cause. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11, 98 S.Ct. 1554, 1561, 56 L.Ed.2d 30 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 151, 94 S.Ct. 1633, 1642, 40 L.Ed.2d 15 (1974); *Glenn v. Newman*, 614 F.2d 467, 471 (5th Cir. 1980). The district court found that the statute creating the Section 8 program was the primary source of the legitimate expectation that a Section 8 tenant would not be evicted absent good cause. 42 U.S.C. § 1437f. While subsection (d)(1)(A) vests the responsibility of tenant selection with the owner, subsection (d)(1)(B) states "the agency shall have the sole right to give notice to vacate, with the owner having the right to make repre-

sentation to the agency for termination of tenancy." The trial court found that these subsections together implicitly grant the PHA absolute authority in terminating tenancies and authorizing evictions. The court noted that vesting the agency with the sole authority to issue the notice to vacate would be meaningless unless the agency actually reviewed the cause advanced by the owner in seeking eviction. Indeed, it is reasonable to implicitly require just cause where the agency itself issues the notice.

Similarly, if Congress had intended to permit termination at will be the owner, it would be useless to require the owner to make representations to the agency and to impose the administrative burden of issuing notices to vacate on the PHA. The owner's duty to make representation also demonstrates the need to assess the propriety of instituting eviction.

The district court also relied on the statutory framework to support its interpretation. In addition to the existing housing program, the Act provides financial assistance for newly constructed and substantially rehabilitated dwellings. With respect to the latter programs, the Act grants the private owner explicit authority to terminate tenancies. 42 U.S.C. § 1437f(e)(2).

The private owner's rights in the existing housing program, however, are restricted to the right to *seek* lease termination and, in so doing, to make representation to the PHA. The PHA has the sole authority to give notice to vacate. Although the legislative history does not indicate why Congress differentiated between the three programs, we hold that the district court did not err in finding that Congress intended a different result in the existing housing program by providing a distinct termination mechanism. The court correctly implied a good cause

requirement as a prerequisite to GRFA's issuance of a notice to vacate.

This conclusion is buttressed by the fact that GRFA's involvement in the private landlord-tenant relationship is confined to instances of premature lease termination, rather than participation in initial lease formation and natural expiration of the lease. The court also correctly recognized that arbitrary evictions would defeat the Act's goal by precluding the poor from taking full advantage of federal rent subsidies for obtaining a decent place to live and by interfering with the policy of promoting economically mixed housing. In the face of arbitrary eviction, the mere provision of federal rent subsidies without attendant due process protections would hardly promote the implicit purposes of assuring "an atmosphere of stability, security, neighborliness, and social justice." *Joy*, 479 F.2d at 1240.

The owners also argue that since the statute permits the PHA and the landlord to enter into contracts for a term as short as one month, that a lease between a tenant and the landlord creates a legitimate expectation of tenancy limited to one month, regardless of the length of the lease. 42 U.S.C. § 1437f(d)(2). We fail to see how the provision for a minimum one month lease term equates the legitimate expectations held under a one month lease with those held under a one year lease. All the leases in this case were for more than a month.

The owners also argue that the HUD regulation implementing the Section 8 program lessens any alleged legitimate expectation of continued occupancy. *See* 24 C.F.R. § 882.215. They urge this court to accord deference to the regulation which permits the owner to send the notice to vacate and which imposes no good cause requirement for

mid-term lease termination. The statute, however, mandates that only the PHA has the authority to issue a notice to vacate. 42 U.S.C. § 1437f(d)(1)(B). The district court thus declared this regulation null and void for conflicting with the statute.[2] Because the eviction regulation is void, we hold that it has no bearing on the tenants' legitimate expectation of mid-term termination only for cause.

The owners also rely on new HUD regulations providing that subsidized tenants have an entitlement of occupancy. The regulation, 24 C.F.R. § 450.3 (1981), states that the landlord may not terminate any tenancy in a subsidized program except upon grounds providing good cause. As proposed, the regulation encompassed the three Section 8 programs. 41 Fed.Reg. 16924, 16924-26 (1976). The final regulation, however, excluded the Section 8 new construction and substantial rehabilitation programs from its coverage because inclusion would "greatly reduce private interest in the program" and because "the Section 8 Program can serve the nation best by vesting private owners the fullest measure of management responsibilities." 41 Fed.Reg. 43330 (1976). We find this language unpersuasive, because it refers only to the new and substantially rehabilitated housing programs which delegated all management, ownership and maintenance responsibilities to the private landlord.

HUD went on to summarily exclude the Section 8 existing housing program from the ambit of the new regulation "to be consistent with the basic philosophy of the program." 41 Fed.Reg. 43330. In so doing, HUD reasoned

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[2] Appellants do not contest on this appeal the trial court's ruling that the HUD regulation is void for conflict with its implementing statute.

that this program is premised on the so called "finders-keepers" concept which permits tenants, once found eligible, to seek housing in the broadest possible area. 41 Fed.Reg. 43330; *see* 24 C.F.R. § 882.103. HUD thus excluded existing housing tenants from the protections afforded by 24 C.F.R. § 450.3 because an evicted tenant is free to move to another dwelling unit and continue to receive benefits. 41 Fed.Reg. 43330. The regulation, however, ignores the separate treatment which Congress explicitly accorded to the existing housing program with respect to the role of the PHA in evictions.

Moreover, Congress recently amended 42 U.S.C. § 1437f(d)(1)(B) by requiring "good cause" for mid-term evictions. Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, § 326(e)(1), 95 Stat. 357, 407.[3] The amended tenancy termination provision deleted the requirement that the PHA shall have the sole right to give notice to vacate with respect to the Section 8 existing housing program. In referring to the "good cause requirement," the legislative history speaks of "the procedural and substantive *rights* of the tenant with respect to occupancy of the unit." H.R.Conf.Rep.No.97-208, 97th

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[3] The Omnibus Reconciliation Act of 1981, Pub.L.No.97-35, § 326, 95 Stat. 357, 407 (amending 42 U.S.C. § 1437f(d)(1)(B) (1978)) provides:

(e)(1) Section 8(d)(1)(B) of the United States Housing Act of 1937 is amended to read as follows:

"(B)(i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the secretary; and

"(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;".

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

Cong., 1st Sess. 694-95, *reprinted in* [1981] U.S.Code Cong. & Ad.News 1010, 1053 (emphasis added). The conferees stated that they did not intend these statutory provisions to govern the landlord-tenant relationship after a landlord has, *in good faith*, terminated his participation in the existing housing program. Although the amendment applies only to leases entered into after October 1, 1981, these statements clarify congressional intent regarding the propriety of implying a good cause requirement in the provision governing the instant case.

For the above reasons, we hold that the district court was correct in concluding that Section 8 existing housing tenants have a protected property interest in their government subsidized leases because their leases may be terminated mid-term only for cause.

V. FAILURE TO JOIN LANDLORD OWNER CLASS

[6] The owners contend that all Section 8 landlords are indispensable parties under Fed.R.Civ.P. 19 [4] because this class action challenges termination and eviction provisions in contracts to which they are parties. The owners further contend that the judgment rendered in the absence of the private landlords as a practical matter impairs their ability to protect their property interests and their

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[4] Fed.R.Civ.P. 19(a) requires joinder of a party if:

(A) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

leases by exercising the termination option. Finally, the owners assert that the named defendant owner has not adequately protected their interests. Since it is no longer feasible to join this defendant class, the owners urge this court to decertify the plaintiff class and vacate the judgment of the district court. Since the named tenant's leases have expired and have not been renewed, rule 19 would require the dismissal of the class action because it is no longer feasible to join the owners. The owners thus argue that the case is moot.

On the other hand, the tenants argue that the landlords are not indispensable parties because they possess no bargaining power with respect to the operation of the Section 8 program or the modification of HUD contracts and leases, and are not actual participants in contract formation. The tenants also rely on the fact that rule 19(d) explicitly excepts class actions from the indispensable party rule. Finally, they argue that failure to join the absent landlords is not error because their interests are identical to and adequately protected by defendants already before this court.

Pursuant to their motion to dismiss and cross-motion for summary judgment, the state defendants argued that, if the court found for the tenants, their request for class-based relief was inappropriate for failure to join an indispensable class of Section 8 owners. State defendants requested that any relief accorded the tenants should be declaratory relief entered for tenants individually. In essence, the state defendants requested the district court to decertify this case as a class action. They neglected, however, to raise an objection on this ground when the court granted class certification.

[7-10] It is a basic principle that a court's judgment will

bind only those who are parties to the suit. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110, 88 S.Ct. 733, 738, 19 L.Ed.2d 936 (1968). The interests of absent parties must be considered in a rule 19 motion governing the joinder of persons needed for just adjudication. *McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980). Failure to raise this issue by proper motion before the trial court does not constitute waiver. 620 F.2d at 51; *Kinball v. Florida Bar*, 537 F.2d 1305, 1307 (5th Cir. 1976). Nevertheless, joinder of an absent class of defendant landlords would serve no purpose under the circumstances of the present case. "When the judgment appealed from does not in a practical sense prejudicially affect the intersts of the absent parties, and those who are parties have failed to object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club v. Hathaway*, 579 F.2d 1162, 1166 (9th Cir. 1978), *quoted in McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980).

[11] The court's decision on joinder is guided by pragmatic concerns, especially the effect on parties and on litigation. *Smith v. State Farm Fire & Casualty Co.*, 633 F.2d 401, 405 (5th Cir. 1980). Because the state defendants and the owners advanced the same position as the absent landlords would have taken, and because their interests were coextensive, we disagree with the assertion that a disposition in the absence of the private owners may, as a practical matter, impair their ability to protect their interests. *United Transportation Union v. Long Island Rail Road*, 634 F.2d 19, 22 (2d Cir. 1980), *appeal pending*, 452 U.S. 960, 101 S.Ct. 3107, 69 L.Ed.2d 970 (1981).

This case does not challenge the propriety of owner Taptich's actions, nor of the conduct of any other private

owner. *Cf. Boles v. Greeneville Housing Authority*, 468 F.2d 476, 478-80 (6th Cir. 1972) (HUD a necessary party when legality of *its* actions is at issue). Rather, this case embraces a challenge to regulations promulgated by HUD and the rights and responsibilities of the tenants and the PHA under the Section 8 program with reference to eviction procedures. *See Texas & Pacific Railway v. City of New Orleans*, 159 F.2d 77, 78 (5th Cir. 1947). Specifically, the controversy in the instant case relates to the due process right of the tenants to demand an eviction procedure which terminates their entitlement for good cause and which the PHA must follow. Since GRFA must assess good cause in every case, we see no reason why the tenants were not entitled to a declaratory judgment to adjudicate the rights and duties under the eviction provision of the statute. Because issuance of the notice to vacate is a decision solely within the discretion and responsibility of GRFA, the district court correctly found that it could afford complete relief to all of the parties without joinder of a defendant class of owners.

[12] Moreover, the tenants' claim to an entitlement requiring due process safeguards does not necessarily conflict with the claims of absent owners so as to adversely affect their interests. *Cf. McCulloch*, 620 F.2d at 51. Alternatively, when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties. *National Licorice Co. v. NLRB*, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940); *see Natural Resources Defense Council, Inc. v. Berklund*, 458 F.Supp. 925, 933 (D.D.C.1978), *aff'd*, 609 F.2d 553 (D.C.Cir.1979) (where environmental organization sought declaratory and injunctive relief against defendant Secretary of Interior in regard to his issuance of preference

right coal leases on federal land, numerous lease applicants who could be adversely affected not indispensable parties).

We find unpersuasive the owner's contention that the absence of other private landlords will subject GRFA to "inconsistent obligations" within the meaning of rule 19(a)(2)(ii). Resolution of the issue in the instant case will result in only one possible obligation: the duty to find the existence of good cause prior to issuing a notice to vacate. *See United Transportation Union*, 634 F.2d at 22; *California Department of Transportation v. City of South Lake Tahoe*, 466 F.Supp. 527, 540-41 (E.D.Cal. 1978). Accordingly, we conclude that the district court properly held that the absent landlords are not an indispensable class.

VI. CONCLUSION

Because we find that the district court properly found (1) that the lease terminations herein constituted state action despite the involvement of a private owner; (2) that Section 8 existing housing tenants had a property interest requiring due process protection in cases of deprivation; and (3) that absent owners were not an indispensable class, we affirm.

AFFIRMED.

APPENDIX B

[Filed in Clerk's Office, December 23, 1980, Ben H. Carter, Clerk; By K. Bates, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

KATHERINE JEFFRIES, on behalf of herself and all others similarly situated, *Plaintiff,* vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL., *Defendants.*	CIVIL ACTION NO. C79-1349

ORDER

Plaintiffs, who are hereby certified as a class defined in the court's order of January 28, 1980, are or have been tenants inhabiting homes the rent for which is partially paid with federal rent subsidies. The Section 8 Existing Housing Assistance Payments Program, which supplies the rent subsidies, was established by Congress through enactment of Section 8 of the Housing and Community Development Act of 1974. 42 U.S.C. §1437f. The program is implemented by regulations found at 24 C.F.R. Part 882.

Eligible participants receive a certificate of family participation, 24 C.F.R. §882.12, which permits low income families to participate in the Section 8 program. Once certified, the family must locate a privately owned dwelling that complies with the housing quality standards approved by the Department of Housing and Urban Development (HUD). 24 C.F.R. §§ 882.103(a) and 882.109. When a certificate holder locates a dwelling he submits a request for lease approval. After approval, the Section 8

Existing Housing Assistance Program participant executes a lease with the owner of the private dwelling. The local Public Housing Agency (PHA), which in this case is the Georgia Residential Finance Authority (GRFA), simultaneously or subsequently executes a Housing Assistance Payment Contract with the owner. The assistance contract provides that assistance payments may be paid only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time the family initially occupies the dwelling. The Housing Assistance Payment Contract addresses contract rent, the family portion of the rent, assistance payments, maintenance, operations, inspections, and evictions among other provisions.

A certified family with a lease pays between 15 and 25 percent of its adjusted income for rent and utilities as determined in accordance with 42 U.S.C. §1437f(c)(3) and 24 C.F.R. §889.105. The balance of the rent is paid by GRFA directly to the owner on behalf of the certified family. The lease entered into by the participant must be approved by GRFA and must conform to regulations in order for payments to be made to the owner.

Each lease under the program is also affected by 42 U.S.C. §1437f(d)(2), which requires each contract for an existing dwelling to be for not less than one month nor more than 180 months. All GRFA leases are for terms of 12, 24, or 36 months, but each lease contains a clause that allows termination upon 30 days written notice by either the landlord or the tenant at will.

Because of the clause allowing termination at will, the program as it now operates in Georgia does not require good cause prior to lease termination and thus provides no basis on which a tenant may contest termination of

his lease. The issue in the present case is whether, under the statute, a lease may be terminated without good cause.

Evictions of Section 8 existing housing tenants are covered by 24 C.F.R. §882.215, the only HUD regulation on the subject, which provides:

> The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objections to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall telephone the PHA and shall be informed by the PHA whether a notice of determination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction.

Congress has provided, however, that assistance payments contracts between a PHA and an owner of existing housing must provide that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termina-

tion of tenancy." 42 U.S.C. §1437f(d)(1)(B). Thus, the statute and the regulation are in apparent conflict.

The statutory provision regarding eviction for existing housing tenants is in contrast to that provided in the Section 8 programs for new or substantially rehabilitated housing. In the latter two Section 8 programs the "contract between the Secretary and the owner . . . shall provide that all owners' ip, management, and maintenance responsibilities, including the selection of tenants and the termination of tenancy, shall be assumed by the owner (or any entity, including a public housing agency, approved by the Secretary, with which the owner may contract for the performance of such responsibilities)." 42 U.S.C. §1437f(e)(2).

All of the plaintiffs have been certified by GRFA as eligible to participate in the Section 8 Existing Housing Assistance Payments Program and were eligible when their leases were terminated or when they received termination notices from their landlord. Each plaintiff entered into a lease with the Midtown Apartments in Conyers, Georiga, for a term of 12 months, but each lease contained a provision allowing either the landlord or the tenant to terminate the lease upon the giving of 30 days notice. Pursuant to the 30-day termination clause, defendant Taptich, the owner of Midtown Apartments, gave notice to plaintiffs that he intended to terminate their leases and simultaneously informed GRFA. GRFA provided no administrative hearing or other relief with respect to the proposed terminations involved in the case. The present litigation ensued.

The essence of plaintiffs' claim is that their due process rights have been violated by the termination procedure involved in GRFA's administration of the Section 8

Existing Housing Program. To evaluate the merits of plaintiffs' contentions properly, the court must systematically address whether or not there has been sufficient state action in this case to implicate the due process clause of the fourteenth amendment, whether or not plaintiffs have a property right in the continued occupancy of their apartments during the terms of their respective leases absent good cause for termination despite the lease provision permitting termination at will, and if so, what processes are required by the Constitution to protect that property right. Therefore, the court will examine each issue separately and sequentially.

I. STATE ACTION

The constitutional prohibition against deprivations of property without due process of law applies only to government action. U.S. Const. amend. XIV. Identical deprivations by private parties are without constitutional implication. Therefore, as a threshold proposition, the court must conclude that there is some form of governmental action before analyzing the substantive property right involved, if any, and the procedural protections available. If there is insufficient governmental involvement in the Section 8 Existing Housing Program, the court's analysis need proceed no further.

Where the hand of government is clear, and its path toward contact with the individual unobstructed, the question of state action is easily resolved. Where, however, the hand of government is clear, but its path toward contact with the individual clouded by the action of a private individual, the question of state action is troublesome and fact-specific. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the

State in private conduct be attributed its true significance." *Burton v. Willmington Parking Authority*, 365 U.S. 715, 722 (1961).

Burton v. Willmington Parking Authority is the controlling case on the issue of state action. In *Burton*, the state of Delaware had leased, through a political subdivision of the state, space in a parking garage to the Eagle Coffee Shoppe, a restaurant that refused to serve blacks. The restaurant was owned and operated solely by private individuals and, other than being located in a public parking garage, had no abnormal contacts with state government. After analyzing the specific facts of the case, including the financing of the garage and benefits conferred by the restaurant and the garage on each other, the Court concluded that the state had "so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Id.* at 725. If, then, GRFA has so far insinuated itself with the private owner in carrying out the challenged eviction procedure, the evictions involved in this case cannot be considered to be purely private and without constitutional importance.

There is unquestionably an important involvement by private landlords in the Section 8 Existing Housing Program as it is administered by GRFA and as it was envisioned by Congress. The government, of course, is intimately involved with the program, but intimate involvement, even significant regulation, will not necessarily result in state action without a close nexus between the state and the eviction of the Section 8 tenant. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The court

finds that such a nexus exists.

The involvement of the federal government is extensive, but when the hand of the federal government acts in the Section 8 program it reaches no further than the PHA. This is consistent with the congressional intent "that primary responsibility for carrying out the leasing program should be vested in public housing agencies." S.Rep. No. 693, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Ad. News 4273, 4314. The Section 8 owner, however, has significant responsibilities for the management of his property. Nevertheless, the nexus between the state and the particular action in question in this case, lease termination and tenant eviction, is both firm and close.

The responsibility of the state for lease termination and eviction is undeniable. The statute explicitly provides that "the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." 42 U.S.C. §1437f(d)(1)(B). The PHA involved here, Georgia Residential Finance Authority, is statutorily created and is an instrumentality of state government. Ga.Code Ann. §99-3604. With respect, then, to tenancy termination and eviction, the state action is apparent. Whether or not the agency is actually issuing notices to vacate, as required by statute, its involvement in the eviction process is unequivocal. Should it fail to issue the statutorily required notice to vacate, its failure is no less a logical action than its actual issuance of a notice to vacate. HUD regulations confirm that failure of the state PHA to act is to be viewed as an action and is deemed an authorization of the eviction. 24 C.F.R. §882.215. Since failure of the state to act is regarded as an affirmative authorization of eviction

under the program as administered, the administrative authorization of inaction no less constitutes an action than an actual authorization of eviction. Klein & Schrider, *Procedural Due Process and the Section 8 Leased Housing Program*, 66 Ky. L.J. 303, 335 (1977).

Aside from the direct involvement of GRFA in the evictions of plaintiffs, there is a nexus between the state and the Section 8 owner sufficient to constitute state action under *Burton*. It is important to note that GRFA screens the prospective tenants, 24 C.F.R. §882.116(c), and reviews the lease between the Section 8 owner and the Section 8 tenant, 24 C.F.R. §882.116(j), as well as authorizes evictions. 24 C.F.R. §882.116(p). In addition, GRFA is in a direct contractual relationship with the Section 8 owner, 42 U.S.C. §1437f(b)(1), who benefits both from the rent subsidy payments directly and from the assurance that those payments will continue under some circumstances despite vacancy. 24 C.F.R. §882.105 (b). The benefits of this contractual relationship flow to the state as well. The Section 8 owner provides housing for those state citizens who, by definition, could not afford a decent place to live without assistance. This privity of contract and conferring of mutual benefits results in a concert of action sufficient to be designated state action under *Burton*.

The court has discovered one similar case involving a state action question much like the one here. *Flamm v. Real-Blt, Inc.*, 168 Mont. 351, 543 P.2d 190 (1975), *cert. denied*, 425 U.S. 941 (1976). In that case, the Supreme Court of Montana found that an eviction by a private landlord receiving federal benefits in the form of mortgage insurance and rent subsidies administered by the Federal Housing Administration was not state action and did not

implicate the due process clause. The lease involved in that case contained a 30-day termination clause as do the leases involved in the present litigation. The Supreme Court of Montana, of course, is not binding on this court, nor is its opinion here persuasive. Even if it were, however, the present case is distinguishable since state action is explicitly required by the federal statute to effect an eviction of a Section 8 tenant. This direct involvement by the state allows the court to avoid a complex search for some hypothetical nexus or intertwining relationship between the state and the private party who has actually acted.

Flamm was reviewed, albeit in a cursory fashion, on plaintiff's application for a stay of the Montana court's decision. *Flamm v. Real-Blt, Inc.*, 424 U.S. 1313 (Rehnquist, Circuit Justice, 1976). Justice Rehnquist denied the stay on the basis that the full Court would not grant certiorari because the 30-day termination clause that appeared in the lease would make it unnecessary to reach the state action issue. Upon careful consideration, this court does not believe its decision should be greatly affected by Justice Rehnquist's opinion in *Flamm*. Since plaintiffs assert that the 30-day clause violates the federal statute that creates the program involved here, the court cannot avoid the constitutional issue and the preliminary state action issue as could Justice Rehnquist.

This court must conclude, therefore, that there is state action in this case. This conclusion is supported by an earlier line of cases in which state action was found to exist where private landlords acted in government subsidized housing programs administered by the Federal Housing Administration. *See, e.g., Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973). The court cannot distinguish

the *Joy* line of cases as having any less government involvement than the present case. In fact, the court cannot see that the state's involvement in evictions under the Section 8 Existing Housing Program could be any greater.

II. THE SUBSTANTIVE PROPERTY INTEREST

Having determined that state action is involved in this case, the court must determine whether or not plaintiffs have a property interest in Section 8 Existing Housing Program leases that cannot be terminated without cause prior to the end of the lease despite the current lease clause that permits termination at will. Such a property interest in a government benefit would certainly be nontraditional, but the concept of property is not static. The Supreme Court has provided an analysis for determining whether or not a particular interest, though nontraditional, may be deemed a property interest subject to the protections of due process.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbirarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Unless plaintiffs' interest is founded on such an objective basis or legitimate expectation, though it be interferred with by the state, it is not protected by the due process clause.

In *Roth*, the Supreme Court examined the system by which a state university chose to hire or rehire nontenured

teachers. The Court found that under state law the decision whether to rehire a nontenured teacher for another year was left to the unfettered discretion of university officials. Therefore, the Court concluded that there was no ligitimate expectation of being rehired. Consequently, the Court failed to find a property interest in *Roth* because there was no more than an abstract need or unilateral expectation of the government benefit at issue.

On the other hand, the Court demonstrated in *Perry v. Sindermann*, 408 U.S. 593 (1972) that a property right in a government benefit may arise implicitly. In other words, an explicit recognition of a property right in a government benefit by positive law is not necessary in order for an interest to be greater than an abstract need or unilateral expectation. Various sources may provide the objectivity necessary to classify an interest as a legitimate expectation and therefore a property interest protected by the due process clause.

The parties have made much of a recent case, *O'Bannon v. Town Court Nursing Center*, ____ U.S. ____, 100 S.Ct. 2467 (1980), as bearing on the question of whether an individual's interest in remaining in a particular dwelling unit the cost of which is subsidized by federal funds constitutes a legitimate expectation or property right. *O'Bannon* addressed the issue of whether certain elderly residents of a nursing home have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with care thus requiring the residents to move. The Court held that though such a revocation may be harmful to the residents, the residents have no constitutional right to participate in the revocation proceedings. *O'Bannon* is a case in which third parties affected by government action against an-

other seek to intervene in that action, and would govern the present case if our facts involved private Section 8 tenants seeking to intervene in proceedings brought by HUD or GRFA to revoke the eligibility of a Section 8 landlord to receive housing assistance payments. Our case, however, involves government action directly against the party involved in the pending litigation. *O'Bannon* does not, therefore, require this court to find that plaintiffs lack a property interest.

Rather, the reasoning expressed in *O'Bannon* would lead one to conclude that the Supreme Court would unanimously find a property interest held by plaintiffs in the present case. All members of the Court agree on the general due process maxim that when a government benefit may only be withdrawn for cause, a legitimate expectation, entitlement, or property interest arises. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980). If the present case fits within the maxim, due process rights attach to protect a tenant's legitimate expectation. Therefore, the court's task is to determine whether or not a Section 8 tenancy may be terminated during midterm only for cause under the federal statute creating the Section 8 Program.

The right to termination of a government benefit only for cause, of course, does not arise from the Constitution itself, *Goss v. Lopez*, 419 U.S. 565, 573 (1975), but such rights may be statutorily created. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Though it is a close question, the court concludes that the statute, regulations, and lease, taken together, yield a legitimate expectation that one will not be evicted from his home inhabited under a Sec-

tion 8 existing housing lease without good cause.

The primary source of this expectation is the statute creating the Section 8 program itself. 42 U.S.C. §1437f. The key provisions of the statute are subsections (d)(1)(A) and (B), which state:

> (d)(1) Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that—
>
> (A) the selection of tenants for such unit shall be the function of the owner, subject to the provisions of the annual contributions contract between the Secretary and the agency;
>
> (B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy.

When these subsections are read in conjunction, they implicitly guarantee that the local public housing agency, here GRFA, has absolute authority in terminating tenancies and authorizing evictions.

Such authority would be meaningless were GRFA not to exercise some review. If Congress had not intended that the PHA actually review the cause for a Section 8 owner's desire to terminate a tenancy, it presumably would not have required a meaningless formality by providing that only the agency shall have the right to give a notice to vacate. Furthermore, the Section 8 owner may only "make representation to the agency for termination of tenancy." The court interprets this language to mean that good cause is required before termination, and the Section 8 owner may only make representation to the agency that good cause for lease termination exists. If

termination at will by the owner had been contemplated by the statute, there would have been no need to require the owner to make representation to the agency and to require the agency to bear the burden of issuing notices to vacate. If good cause were not required to terminate the tenancy, the owner would have nothing to make a representation about.

The structure of the legislation as enacted by Congress supports this conclusion. In addition to the existing housing program, there are two other Section 8 programs. Congress explicitly provides that in both of the other programs "all ownership, management, and maintenance responsibilities, including the selection of tenants and the *termination of tenancy*, shall be assumed by the owner." 42 U.S.C. §1437f(e)(2) (emphasis added). Congress, then, has created three similar programs. In two of them, the private owner has explicit authority to terminate tenancies. In the other, only the PHA has the right to give notice to vacate and the private owner may do no more than seek the termination of the tenancy. The court does not believe that Congress explicitly provided for termination of tenancy by owners in the new or substantially rehabilitated housing programs and, by providing that the agency should have the sole right to give notice, intended the same result in the existing housing program. Therefore, the court concludes that Congress implicitly required that PHAs review an owner's representations for termination of tenancy for good cause and issue notices to vacate only when good cause is found.

Furthermore, Congress only provided that the PHA take an active involvement in the midterm termination of leases. PHA involvement is not required when a landlord-tenant relationship is formed. The PHA is charged

with certain administrative duties such as approving the lease, 24 C.F.R. §882.116(j), but "the selection of tenants . . . shall be the function of the owner." 42 U.S.C. §1437f(d)(1)(A). Nor is government action required by the statute should a Section 8 landlord desire to end the landlord-tenant relationship when the term of a lease has run. Thus, defendants' statutory interpretation that Congress intended the Section 8 program to operate in the same manner as a totally private landlord-tenant relationship finds expression in the legislative scheme. But the fact that Congress omitted PHA involvement from the formation and termination of the landlord-tenant relationship at the natural beginning and end of the lease forming the basis for that relationship and included PHA involvement in the unnatural termination of the landlord-tenant relationship strengthens the conclusion that some reason or good cause must exist to prematurely terminate a Section 8 landlord-tenant relationship. This implicit congressional intention, embodied in the statutory language, is sufficient in the court's view to create a legitimate expectation that falls within the purview of due process protections.

The court's conclusion is strengthened by the general policy of the Section 8 program. According to the statute, the program is for "the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. §1437f(a). Arbitrary evictions upon the giving of 30 days notice would subvert this goal by interfering with the objective to aid low income families in obtaining a decent place to live with any security and by interfering with the policy of promoting economically mixed housing with any stability. Klein & Schrider, *supra* at 344. "It is apparent, from the statutory language and the regulations promul-

gated to effect the Act, that the purpose of the Act is to enable poor and elderly persons . . . to take full advantage of housing assistance offered by the federal government." *Brezina v. Dowdall*, 472 F.Supp 82, 85 (W.D. Ill. 1979). Arbitrary evictions hardly foster the goal of allowing citizens to take full advantage of federal rent subsidies.

The stated purpose of the Section 8 program is not unlike the stated purposes of conventional government housing projects or other federal rent subsidy programs provided for low-income residents of private housing. Among the implied purposes of the Section 8 program, as in other federal hosing programs, is the purpose to assure an atmosphere of stability, security, neighborliness, and social justice. *Joy*, 479 F.2d at 1240. Arbitrary evictions contradict the goal of social justice, foster an atmosphere of hostility, and contribute to feelings of anomie and alienation. Note, *Procedural Due Process in Government-Subsidized Housing*, 88 Harv. L.Rev. 880 (1975). This policy analysis supports the conclusion that the expectation of plaintiffs is more than merely unilateral.

Since contracts between a PHA and an owner under the statute may be for a term as short as one month, 42 U.S.C. §1437f(d)(2), the owner may, *a priori*, enter into a lease with a Section 8 tenant for a term of only one month. If does not follow, however, from the fact that a lease may permissibly be only one month in duration under the statute, that a tenant with a one year lease may only legitimately expect occupancy for one month at a time. Nor does it follow from the fact that a lease may only be for one month that Congress intended for the tenant to only have a legitimate expectation of tenancy undisturbed for one month regardless of the length of his lease. If there is any difference at all between a one month lease

and a one year lease, it must be the legitimate expectations held under them.

Of course, the existence of the Section 8 eviction regulation, 24 C.F.R. §882.215, could lessen the objective legitimacy of the tenant's expectations. The eviction regulation promulgated by the Department of Housing and Urban Development, however, is in fatal conflict with the statute enacted by Congress. Under the statute, the PHA is the only party that can give a notice to vacate. 42 U.S.C. §1437f(d)(1)(B). The regulation, however, permits the owner to send the notice to a tenant. 24 C.F.R. §882.215. This conflict has already been noted in *Brown v. Harris*, 491 F.Supp. 845 (N.D.Cal. 1980). "The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience." *Id.* at 847. An administrative regulation that does so and that conflicts with the statute to which it is pursuant, is of no import and is but a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). Since the eviction regulation is void, then, the tenants' ligitimate expectation of midterm termination only for cause is not lessened. Plaintiffs, as Section 8 existing housing tenants, therefore have a property interest of which state government cannot deprive them without affording the tenants due process of law. U.S.Const. amend XIV.

III. THE PROCESS DUE

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court, however, has not set down any particular process in stone. Rather, the application of due process is a practical

exercise and calls for flexibility. "It has been said so often . . . as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* But the Supreme Court's commitment to some form of hearing before an individual is deprived of an interest in property has been constant and unyielding, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and that Court has suggested an analytical framework for applying the due process clause to particular situations. Three district factors must be weighed in a balancing approach. First, the court must consider the private interest that will be affected. Second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or alternative procedural safeguards should be considered. Finally, the government interest, both the physical and administrative burdens placed on government agencies and the government function involved, is to be weighed and enters into the balancing formula. *Id.* at 335. This court will structure its analysis accordingly.

The severity of the deprivation of the property interest at stake provides an initial measure of the degree of the procedural protection that the individual is entitled to demand from government. The interest at stake here, an individual's interest in remaining in his home, is unquestionably substantial. *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2nd Cir. 1973). Initially, the court notes that an individual's interest in his home is traditionally afforded a certain degree of sanctity in our legal system. That sanctity finds its expression, among other places, in the fourth amendment, and it is no less entitled to recognition here.

Moreover, the fact that the housing involved in this case is provided by the government for those living at subsistence levels implicates special concerns. In this context, the normal burdens associated with the loss of one's home are of heightened intensity and additional burdens not present in normal circumstances are implicated. "The loss of assisted housing is likely to impose financial hardship on the evicted tenant. In addition to financial strain, the evicted tenant will suffer psychological deprivation relating to a change in neighbors and familiar surroundings. If a tenant is evicted for being undesirable, it is likely that he will be unable to qualify for other public housing or even private housing if the stigma of being undesirable follows him." Klein and Shrider, *supra* at 344-45 (footnotes omitted).

The aggravated nature of need and deprivation in this case increases the weight to be afforded to the deprivation in the balancing scheme. *Goldberg v. Kelley*, 397 U.S. 254 (1970). Even the fact that a particular deprivations of grave consequence, however, is not determinative. "Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken* or *unjustified* deprivation of . . . property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Therefore, the court must consider not only the weight of the deprivation but the risk that the deprivation may be made erroneously. The flexible rules of due process are shaped by the risk of error inherent in the truth-finding process and the rules are meant to minimize erroneous deprivations by enabling individuals to contest the basis upon which the government proposes to deprive them of a property interest. *Id.* at 260. "If severity of deprivation is massive but the type of issue in dispute makes a requested

procedure useless, then the interest of the individual in obtaining that procedure should be totally discounted." Note, *supra* at 1519 (footnote omitted).

Furthermore, procedural due process rules are shaped according to the risk of error in the generality of cases rather than in unusual cases. *Mathews*, 424 U.S. at 344. Therefore, the court turns its attention to the value of due process rules in the particular context of the Section 8 Existing Housing Program.

In some cases information relevant to a decision to deprive an individual of a property interest and sufficient information to make the risk of error negligible may be obtained solely in writing. In fact, pertinent information may be more amenable to written than oral presentation in certain cases such as Social Security disability benefits. 424 U.S. 319. In *Mathews v. Eldridge*, for instance, the decision that affected the property right in Social Security disability benefits was based on highly technical data. The decision was easily focused and the information on which it depended was easily documented. The key information, in fact, was a medical report. Although differing medical reports could have been obtained, credibility was not an important issue and the dispute over deprivation was not likely to turn on disputed issues of fact. In cases that are not technical and focused, however, written submissions are likely to be inadequate. *Id.* at 343.

The termination of a Section 8 tenant for good cause is likely to be highly factual rather than technical, and the generality of cases is likely to involve determinations of credibility. By definition, Section 8 benefits are awarded to people with very small incomes. The court is aware that these individuals are unlikely to be advanced in educational attainment or highly skilled in the use or the

techniques of English composition. This, of course, is not uniformly true, but as discussed above, the requisite due process rules must be defined in accordance with the generality of cases rather than in accordance with rare cases. The court is also aware that even among those highly educated, the ability to effectively present ideas in writing is rare. Therefore, to require Section 8 tenants to do so seems an especially futile exercise. To rest a decision regarding the deprivation of a Section 8 tenant's property right on a purely written presentation, is highly likely to result in error from the omission from consideration of unarticulated or unskillfully articulated arguments. Furthermore, written presentations will totally neglect questions of credibility, upon which the determinations of fact in a highly fact-specific dispute are likely to turn. *Goldberg*, 397 U.S. at 269.

This court finds, in agreement with *Goldberg v. Kelley*, that as in "almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* Therefore, an oral hearing is constitutionally necessary before a Section 8 tenancy may be terminated during the term of the lease. Balanced against the factors of the weight of the private interest and the risk of erroneous deprivation, is the weight of the governmental interests involved, the administrative burden that will be created by a hearing procedure, and the governmental function to be served.

Requiring GRFA to conduct a full evidentiary hearing in order to allow a landlord to terminate a Section 8 tenant would significantly add to the agency's administrative burden. The costs associated with this burden include both the expense of providing a large number of

hearings and the cost of continuing benefits to those tenants properly terminated for good cause. "We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347. Nor can administrative costs be considered in a vacuum. Administrative expenses are most likely to be met, not by increased funding for GRFA, but by decreasing the rent subsidy benefits currently being paid to eligible Section 8 families or that may become available to pay rent subsidies in the future. Thus, the cost of the hearing procedure is likely to be at the direct expense of the services provided by GRFA, and thus at the direct expense of those in need of housing assistance. This, the court believes, is neither in the interest of plaintiffs nor other Section 8 tenants.

The court must also consider the governmental interest in providing Section 8 rent subsidies, and that interest weighs into the due process balance that the court must strike. "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty, to ourselves and our Prosperity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it." *Goldberg*, 397 U.S. at 265. The governmental function and interest in the case of Section 8 rent subsidies for existing housing are identical to those expressed by the *Goldberg* Court.

Furthermore, in support of the Section 8 program and policy, the government has an interest in encouraging the participation of private owners. "If governmental due process standards are imposed on landlords, many pri-

vate owners may be uninterested in participating in the program, especially if they can easily rent the same unit to nonassisted families who could be evicted without due process procedures." Heen, *Due Process Protection for Tenants and Section 8 Assisted Housing*, 12 Clearinghouse Review 1, 15 (1979). In sum, then, the government has an interest in continuing the rent subsidies program under the Section 8 Existing Housing Program. The court must consider the governmental interest in maintaining the level of Section 8 services and in encouraging the participation of private landlords, without whom the program could not function at all. The overall governmental interest in promoting the general welfare and in continuing to provide decent and safe housing for low-income families, like the individual interest involved, is heavy. Some balance must be struck.

The court believes that some form of hearing is necessary in order to comply with due process before a Section 8 lease can be terminated for cause. Furthermore, the court believes it necessary that the hearing take place before the deprivation is effected. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Since the individual interest, the risk of erroneous deprivation, and the governmental interest in the present case are similar to the interest in *Goldberg*, the court finds that the hearing in the present case must conform to all of the procedural protections found necessary by the Supreme Court in *Goldberg*. The key concept guiding the provision of a hearing in this case must be to provide a hearing at a meaningful time to be held in a meaningful manner. *Goldberg*, 397 U.S. at 267.

The court does not believe, however, that GRFA must provide an administrative hearing in Georgia in order to

provide a meaningful hearing at a meaningful time. The court has looked to Georgia law and found an existing procedure that is both appropriate to protect the property interest of plaintiffs in this case as well as constitutionally adequate. Furthermore, the existing procedure found in Chapter 61-3 of the Georgia Code represents a well-struck balance between the factors to be considered here. First, as discussed below, the state court proceeding meets the requirements of due process and allows the Section 8 tenant to adequately present his case to a state court judge prior to a threatened eviction. At the same time, the state court proceeding and the institution of state courts are already available and existing. Therefore, no further commitment of state resources not already contemplated and provided is required by this alternative. GRFA need not commit further resources or divert existing resources into providing hearings since the state court system is presently available. The procedure dictated in the Georgia Code is consistent with the height of due process concerns, and as a full evidentiary and adversary proceeding complete with a jury, it represents the best available truth-finding device that has been yet required by a court under the due process clause.

The Georgia proceeding does allow for a determination of good cause for lease termination. The statute explicitly provides that a landlord may use the procedure when a tenant fails to pay rent when due or holds over after a lease had ended. Thus, the statute defines cause as a failure to pay rent as well as a material breach of a lease that would cause the lease to terminate and make continued occupancy by the tenant a hold over situation. Ga.Code Ann. §61-301. It is appropriate to defer to state law for a definition of good cause even though the Section

8 program is of federal origin. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Since the court defers to state law to define good cause, deference to state courts with their accumulated expertise in state law is a wise course.

The Georgia statute does not permit a lease termination at the landlord's will absent a valid clause in the lease permitting termination at will. Since a clause permitting the landlord to terminate at will would be invalid in the Section 8 context, the Georgia statutory procedure could not be used to effect a termination without good cause. Thus, the court is not disturbed by the criticism of using a state court proceeding expressed in *Owens v. Housing Authority*, 394 F.Supp. 1267 (D.Conn. 1975) and *Brown v. Housing Authority*, 340 F.Supp 114 (E.D.Wis.), *aff'd*, 471 F.d 63 (7th Cir. 1972). Nor is the Georgia procedure flawed in limiting the availability of constitutional defenses or appeal to a higher state court.

Because the Georgia proceeding takes into account the interest to be protected under the Existing Housing Program, the court finds that it is an adequate protection for Section 8 tenants. *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Anderson v. Denny*, 365 F.Supp 1254 (W.D.Va. 1973). Of course, the adequacy of state proceedings is a question of federal law in this case, *Vitek v. Jones*, 445 U.S. 480 (1980), but the court believes the Georgia proceeding provides greater protection than the eviction proceeding approved by the Supreme Court in *Lindsey v. Normet*, 405 U.S. 56 (1972). In that case, the Court approved an Oregon statute providing for summary proceedings to be held no later than 6 days after service of process absent a posting of security and for the limitation of issues at trial to whether or not a default had occurred.

The Georgia procedure is not truncated either as to time, Ga.Code Ann. §61-303, or as to issues. Furthermore, the Georgia statute is without the pernicious equal protection violation contained in the Oregon statute that a losing tenant post double-bond to appeal. Ga. Code Ann. §61-306.

This state court option also furthers the congressional purpose of allowing families assisted under the Section 8 program to function as non-assisted families in the private housing market. Since the procedure in Chapter 61-3 of the Georgia Code would have to be followed by a landlord for a tenant in the unassisted private housing market, using the same procedure for a Section 8 lease is presumably consistent with congressional purposes. Of course, the 30 day termination clause, which is forbidden in the context of the Section 8 Existing Housing Program, could be used to terminate a lease, create hold over status, and trigger the Chapter 61-3 procedure in the case of an unassisted tenant. Aside from prohibiting the 30 day termination clause, which this court has found that Congress intended to do, the Section 8 family would function exactly as does an unassisted family. The Georgia procedure, then, is both constitutionally adequate and statutorily preferable.

Of course, the statute creating the Section 8 program still requires the PHA to review a landlord's request for lease termination for good cause. Despite the fact that due process must occur before a Section 8 family can be finally deprived of its lease and evicted, GRFA cannot ignore the congressional mandate to review a landlord's request. If it finds no good cause, it cannot authorize the termination, hold over status will not arise, and the landlord cannot gain an eviction order in state court without

challenging the validity of GRFA's denial of his request. GRFA must exercise due care in discharging its statutory responsibility. The court, however, declines to specify a particular procedure by which the Authority should comply with the statute, but the court does hold that GRFA need not have a separate hearing on the question of whether or not the landlord has good cause for termination before it authorizes a termination or before it issues a notice to evict. Neither justice nor due process of law require that two hearings be held. *Goldberg*, 397 U.S. at 267 n.14. Since state law provides a proceeding adequate to determine if good cause for termination exists before a deprivation can occur, GRFA is relieved from the burden of providing a hearing that would be redundant and wasteful of social resources.

The court's order minimizes the burdens on the private landlord and on the state while protecting the property interest of Section 8 tenants. Since the Section 8 owner would have to go to court in Georgia anyway to evict a tenant who did not acquiesce in the eviction, the "landlord would be spared the burden of two hearings and he would be assured of being able to evict any tenant who was violating a material lease provision or state law." Klein & Schrider, *supra* at 348. An argument might be made that relying on the Georgia procedure, rather than a summary administrative procedure, in some cases may be adverse to public health and safety or to the well-being of other tenants. The Georgia procedure provides for expedience, however, and the state courts presumably would be aware of the need for haste when that need existed. Ga.Code Ann. §61-303.

The court's solution to this problem is arguably flawed by leaving the task of evolving doctrine which defines

good cause for a federal program to state courts. Note, *supra* at 908-09. This court believes, however, that state courts are the appropriate forum to develop a doctrine of good cause for lease termination if one need be developed. The Georgia statute contemplates such a good cause doctrine, Ga. Code Ann. §61-301, and the federal law seems to contemplate that Section 8 tenants should be subject to the state substantive law of landlord-tenant relations. Finally, the judicial process for holdover evictions in the superior courts of Georgia is subject to review by a higher state court, and in the event of misapplication of federal law, may be reviewed by the Supreme Court of the United States.

It has also been suggested that requiring state court litigation will increase the cost to the parties of dispute resolution. Assuming this to be true, the court is not convinced that requiring the parties to bear this own costs is unwise. Requiring the parties to bear their own costs in settling their own disputes in state court rather than judicially requiring all the citizens of Georgia to subsidize an administrative hearing and dispute resolution procedure, either at the cost of additional funding to or in decreased availability of rent subsidies, has the advantage of placing the financial burden of dispute resolution on the parties who are best able to avoid requiring the state to intervene in their private dispute. The court is unwilling to require the citizens of Georgia to provide a dispute resolution mechanism beyond the state court system that they have already provided in order to keep the peace. Of course, tenants are unlikely to be able to hire private legal assistance in defending an action brought under section 61-301 of the Georgia Code. Tenants, however, will have access to legal assistance for which the state

and its citizens have already provided funding. The resources so committed will be further strained by defending hold over actions, but the due process clause does not require the public to unwillingly commit further resources to this purpose. *Goldberg*, 397 U.S. at 270.

Finally, the court is unconvinced that private landlords will be unduly burdened by requiring them to use the Georgia proceeding against tenants holding over. Since the private landlord would be forced to resort to the same procedure against a tenant unassisted by Section 8 subsidies, the private sector is no more attractive than the Section 8 Existing Housing Program, at least as to eviction procedures. Although termination at will is permissible in a private lease but not in the present Section 8 context, the court believes Section 8 landlords are the recipients of other benefits that, on the whole, counterbalance this inconvenience. At worst, the difference in attractiveness, is not so great as to result in a mass exodus of private landlords from the Section 8 Existing Housing Program.

IV. CONCLUSION

On June 30, 1980, this court issued and stayed a preliminary injunction against defendants pending a hearing at which defendants had the opportunity to show cause why the injunction should not be made permanent. That hearing was held on August 27, 1980, and the court has carefully considered the briefs and arguments presented. Based on the foregoing reasoning, the court vacates its June 30 injunction and order insofar as it conflicts with the present order. Since the court has found that plaintiffs are adequately protected by state court proceedings,

no injunction will issue, and plaintiffs request for injunctive relief is hereby DENIED. Until it has evidence to the contrary, the court assumes that defendants, most of whom are officers or agencies of the state or federal governments, will comply with its order. *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964).

In conclusion, plaintiffs' motion for summary judgment is GRANTED and declaratory relief is GRANTED as set forth above in accordance with the opinion of the court.

All other motions pending in this case not resolved by this order are now moot and are therefore DENIED.

So ORDERED this 22nd day of December, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed in Clerk's Office, U.S.D.C. – Atlanta, June 30, 1980, Ben H. Carter, Clerk; By: MH, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHERINE JEFFRIES, on behalf of herself and all others similarly situated, *Plaintiff*, vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; Et Al., *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This class action suit for injunctive and declaratory relief challenges the actions of the defendants under the National Housing Act, as amended by the Housing and Community Development Act of 1974. 42 U.S.C. §1437 (f). The parties have stipulated a number of facts and have submitted cross-motions for summary judgment. The defendants are the Georgia Residential Finance Authority (GRFA) which administers the existing housing rent supplement program in Georgia, some of its administrators, the Secretary of Department of Housing and Urban Development, other federal officials, and the landlord of the named plaintiffs.

Before considering those cross-motions, the court must dispose of several preliminary motions made by the state defendants.

The state defendants have moved the court to dismiss

the action on the ground that the court lacks jurisdiction of the subject matter. If any of the grounds for subject matter jurisdiction urged by the plaintiffs is valid, then the court can assume jurisdiction of this case. The plaintiffs have alleged that the defendants have violated the due process clause of the Fourteenth Amendment, the statute providing that only the agency may give a tenant notice-to-vacate, 42 U..C. §1437f(d)(1)(B), and the implementing regulations. 24 C.F.R. §882.215. The claim that the defendants have acted to deprive them of rights secured by the constitution and federal statutes states a cause of action under 42 U.S.C. §1983. Subject matter jurisdiction for alleged deprivations of constitutional rights is conferred on this court by 28 U.S.C. §1343(3). The only hurdle the plaintiffs must cross is showing that their constitutional claim is substantial under the test stated in *Hagans v. Levine*, 415 U.S. 528 (1974). The plaintiffs' due process claim is that they are deprived without due process of their entitlement to a year's occupancy under a housing program created by a federal statute. This court cannot say that this novel claim is frivolous or insubstantial or that prior cases foreclose a decision in favor of plaintiffs. Because the constitutional claim is properly within the court's subject matter jurisdiction, this court has pendent jurisdiction over the plaintiffs' statutory and regulatory claims.

The state defendants have also argued that there is insufficient state action in this case to found subject matter jurisdiction under the Fourteenth Amendment and 42 U.S.C. §1343. This claim is without merit as the activity of the Georgia Residential Finance Authority (GRFA), admittedly a state agency, is extensive. The state defendants' reliance on recent Supreme Court decisions is misplaced; the entanglement of the state in the administra-

tion of the existing housing supplemental rent program is sufficient to establish state action under *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

In addition, 28 U.S.C. §1331(a) gives the court jurisdiction of civil actions which arise under federal law and which are brought against federal officials, regardless of jurisdictional amount. The plaintiffs have sued to enjoin the Secretary of HUD from implementing a regulation which conflicts with a statute. Since the court has jurisdiction of this claim, it has pendent jurisdiction of the claims against the state defendants.

The state defendants have also asserted that the plaintiffs have failed to state a claim upon which relief can be granted on the theory that there is no statute which authorizes the plaintiffs' cause of action. The court finds that the plaintiffs may proceed on a cause of action implied from the Housing and Community Development Act of 1974 or under 42 U.S.C. §1983.

The state defendants have also moved for judgment on the pleadings for purposes of the class allegation for failure to join an indispensable class of defendants, i.e., all landlords in the program. In other words, the state defendants are asking the court to de-certify this case as a class action. When the court certified this case as a class action, the state defendants raised no objection on this ground. The court finds that it will be able to accord complete relief to all of the parties without joinder of a defendant class of landlords. In the court's opinion, this case is not a challenge to any action by the landlords but is a challenge to the regulations promulgated by HUD and the supervision of the program by GRFA. Under that view of the case, the landlords are not an indispensable class.

The court will now consider the cross-motions for summary judgment filed separately by the plaintiffs, the federal defendants and the state defendants.

The plaintiffs have challenged a HUD regulation as being in fatal conflict with the statute. The statutory provision is found in 42 U.S.C. §1437f(d)(1) which provides, "Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that (B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy."

The regulation implementing this provision provides: "The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objection to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall telephone the PHA and shall be informed by the PHA

whether a notice of the termination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction." 24 C.F.R. §882.215.

The regulation is in conflict with the statute for several reasons. First the regulation purports to allow the owner to give the family a "written notice of the proposed eviction." The statute however only gives to the owner the right to request the agency to be allowed to terminate the tenancy ("make representation to the agency for termination of tenancy"). Further, the statute requires the agency to give the notice to vacate, but the regulation specifically allows the agency to avoid sending any notice through the lapse of time. Thus, a family could be evicted based solely on written notice from the owner and the lapse of time. The family would never have received a notice to vacate from the agency which is required by the statute. The court accordingly finds that the regulation violates the statute. This conclusion is supported by the decision of a district court which has enjoined HUD from implementing this regulation. *Brown v. Harris*, Case No. C-79-0595- WAI(SJ) (N.D.Cal. Feb. 28, 1980).

The plaintiffs also argue that the statutory scheme and lease create for them an entitlement to a year's occupancy which is a property interest within the meaning of the due process clause. They contend that GRFA can authorize a landlord-initiated, mid-term lease termination only for cause and after observing procedural safeguards required by the due process clause.

Before examining the issue of the existence and scope of a tenant's property interest, the court will return to the issue of state action—an issue touched upon briefly in the discussion of subject matter jurisdiction. If no state

action exists, then the plaintiffs may not rely upon the due process clause. As the court indicated earlier, the involvement of GRFA in the rent supplement program for existing housing is extensive. GRFA must certify tenant eligibility and determine which landlords may participate in the program. The agency inspects housing units to determine which can be occupied by participating tenants and enters into contracts with individual landlords. The rent supplement checks are sent directly from GRFA to the individual landlord. More importantly, Congress envisioned some role for GRFA in lease terminations since only the public housing agency is entitled to send the notice to vacate. 42 U.S.C. §1437f(d)(1)(B). The court concludes that sufficient state action exists to invoke the protections of the fourteenth amendment.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), do not require a contrary result. *Flagg Brothers* held that there was no state action when a warehouseman sold a debtor's goods which were in his possession to satisfy a lien for unpaid storage charges. A state law authorized such sales. *Jackson* found no state action when a private electrical utility terminated services even though the utility was licensed by the state and given virtually a monopoly status. These two cases involve private actors whose relationship with the state is not close enough to create state action. In this case, however, the public housing authority has the sole right to issue the notice to vacate. This activity is sufficient state action even though the public housing authority is clearly not the landlord.

Even when state action is involved, the person invoking the due process clause must show the existence of a protected interest—life, liberty or property. It is well

settled that even where state action is present, if no entitlement is created, then deprivation without procedural safeguards does not offend the due process clause. For example, in *O'Bannon v. Town Court Nursing Center*, 48 U.S.L.W. 4842 (1980), the Supreme Court held that Medicaid provisions conferred no property right on nursing home residents to continued residence in the nursing home of their choice when the home was decertified. In *Bishop v. Wood*, 426 U.S. 341 (1976), the Supreme Court held that by state law and local ordinance, a policeman could be fired without cause because the state law did not create a legitimate expectation of continued employment. *See also Vitek v. Jones*, 48 U.S.L.W. 4317 (1980) (holding that constitutionally protected liberty interest created by state statute). The plaintiffs assert that the statute, lease and regulations create for them a legitimate expectation of one year's occupancy.

In this case, the statute provides that each contract to make assistance payments between a public housing authority and an owner of existing housing "shall be for a term of not less than one month nor more than one hundred and eighty months." 42 U.S.C. §1437f(d)(2). 24 C.F.R. §882.107(b) provides: "The lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party. The term of the lease shall be as agreed by the Family and the Owner, subject to the limitations of the preceding sentence. The term of the Contract [between the public housing authority and Owner] shall be for the term of the Lease . . ." Provision is also made for holdover tenants which is not challenged in this action.

GRFA has a standard form lease with an addendum

which was used as the lease for the named plaintiffs in this case. The addendum contains the HUD regulation on eviction which, as this court has held, fails to comply with the statute. The standard form lease in paragraph 1 provides, "The Lease shall be for not less than one year nor more than three years but may be terminated upon 30 days advance written notice by either party." This language is authorized by 24 C.F.R. §882.107(b).[1] All the leases of the named plaintiffs were for one year.

The court finds that the leases are for one year and that the plaintiffs have a valid expectation of occupancy for one year. The more difficult hurdle for the plaintiffs to cross is whether the expectation is for one year's occupancy which can be unilaterally terminated by the owner *without cause* so long as the 30 day notice requirement is met or whether the expectation is for one year's occupancy terminable with 30 days notice and for *good cause* only.

The question is a close one, and the statute provides little guidance, but on balance, the court finds that the tenants have a ligitimate expectation that the lease will be only terminated for cause. This expectation is created by the statutory provision that the "owner [has] the right to make representation to the agency for termination of tenancy." Only the agency can give the "notice to vacate." This implies that the owner must seek approval

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[1] The plaintiffs have not challenged the one-year lease duration requirement created by the regulations as it is not in their interest to do so. The statute permits a one-month contract between the owner and PHA, 42 U.S.C. §1437f(d)(2), but the regulations key the duration of the contract to the duration of the lease, which must be for at least a year. 24 C.F.R. §882.107(b). The effect is that one month contracts, specifically allowed by Congress, are not permitted by HUD—another example of the agency's ignoring the plain meaning of the statute.

from the agency in order to evict a tenant.[2] The state defendants have argued that they have no duty in authorizing the lease termination but simply rubberstamp each request. This procedure, however, nullifies the role the agency has been given by Congress.

The plaintiff seeks to have cause defined as a material or repeated breach of the terms of the lease. The court defines cause as a breach of the lease that would entitle the landlord under state law to treat the lease as over.

Having determined that mid-term lease terminations can be effected only for good cause, then it is clear that the tenants have a property interest which is protected by the due process clause. The question then becomes, how much process is due?

First, the landlord may intiate an agency determination by making an application to terminate the lease. 42 C.F.R. §882.107(b). This is merely an application, not a notice to vacate. A copy should be sent to the tenant and should include a statement of reasons (cause). The notice should include not only the possibility of lease termination but also the procedure for challenging the proposed

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[2] The defendants have attempted to distinguish between lease termination and eviction. They admit that eviction requires some agency review, 24 C.F.R. §882-215, but argue that no agency review is required when the landloard terminates the lease (and presumably the agency terminates housing assistance payments). If this procedure were followed, the landlord/owner could always seek first to terminate the lease and then to evict. If lease termination without cause ended the involvement of the agency, then the tenant could not seek agency review of a subsequent eviction and would have to rely on state court proceedings. Thus, under the HUD regulations, the owner with 20 days notice could get rid of any tenant and preclude any agency review. The defendants have not explained how unbridled landlord discretion is authorized by the statute which states that the agency has the sole right to give notice to vacate. The lease termination provisions provide to owners a simple means of avoiding the eviction regulation.

termination. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1(1978).

Since GRFA must determine whether to give the notice to vacate, the procedure for challenging the proposed termination must be to some GRFA employee, who is a neutral fact-finder in this case. The tenant should be given an opportunity to present his case orally or in writing to the GRFA employee. The owner should also be able to present his facts to the GRFA employee. Both parties should be able to present witnesses and question the witnesses of the other party. The procedure should be *informal*. The rules of evidence should not apply, but either party should have the right to counsel.

If the GRFA employee decides to issue a notice to vacate, then it should include a statement of reasons. In no circumstances should failure to issue the notice to vacate be construed as an authorization for eviction.

The state defendants have argued that this lease was intended to be between landlord and tenant with as little state involvement as possible. The court is of the opinion that such a program might be a superior one to the one Congress has passed. The court cannot, however, ignore the plain import of the statute.

The court accordingly GRANTS in part and DENIES in part the plaintiffs' motion for summary judgment. The motions of the defendants are DENIED. The court enters the following preliminary injunction:

The defendants are enjoined from enforcing 24 C.F.R. §882.215 and from permitting owners to send to Section 8 program participants the notice to vacate.

The defendants are enjoined to permit landlord-initiated mid-term lease terminations only for cause.

The owner may initiate lease termination by applying to GRFA for lease termination. The application shall include a statement of reasons and of procedures by which the program participant may challenge the termination. A copy shall be sent to the tenant.

If the tenant seeks a hearing, a GRFA employee shall hold a hearing. The rules of evidence will not apply, but an attorney for either party may attend. Each party may speak on his own behalf, present witnesses, and question opposing witnesses.

Only GRFA may issue the notice to vacate and must include a statement of reasons.

On its own motion, the court STAYS the effect of this preliminary injunction. The parties are ordered to show cause why this preliminary injunction should not be entered as the permanent injunction in this case at a hearing to be held within 30 days. (The court will notify the parties of the exact date of the hearing later.)

Any motion for reconsideration is due within 15 days from the receipt of this order. Responses are due from opposing counsel within 5 days from the receipt of any motion to reconsider.

Any request to present evidence at the show cause hearing is due within 15 days of the date of this order.

So ORDERED this 30 day of June, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed in Clerk's Office, Jan. 28, 1980, Ben H. Carter, Clerk; By MH, Deputy Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

KATHERINE JEFFRIES, ROSE HECTOR, EDDIE MAUDE FRANKLIN and BELINDA CLARKE, on behalf of themselves and all others similarly situated, *Plaintiffs,* vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; et al., *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This suit was brought by Katherine Jeffries and other named plaintiffs as a class action against the Georgia Residential Finance Authority (GRFA), its director and several of its officials, the Secretary of the Department of Housing and Urban Development and Landlord R. F. Taptich for injunctive and declaratory relief for violations of the National Housing Act, 42 U.S.C. §1437(f). On January 3, 1980, shortly after transfer of this case from Judge Edenfield, an informal conference was held with all parties to resolve disputed discovery issues and to provide a framework for orderly treatment of the litigation. Although the parties at that time stated that it was not necessary for the court to enter an order summarizing their agreement, the plaintiffs have since initiated a "battle of letters" over the contents of the agree-

ment and have raised by motion several other issues. The court regrettably finds it necessary to enter the order which the parties stated was unnecessary.

Pending before the court on January 3 were the following plaintiffs' motions: (1) motion for temporary restraining order, (2) motion for expedited discovery, (3) motion for permanent class certification, (4) motion to compel, and (5) motion for preliminary injunction. Also pending was defendants' motion for a protective order. Through its order of December 21, 1979, the court had granted plaintiffs' motion to amend its complaint and plaintiffs' motion for conditional class certification.

At the January 3 conference, the parties agreed that the case presents issues of law and not issues of fact. Accordingly, the parties agreed to prepare jointly a statement of material facts. The stipulated facts, the parties agreed, would be submitted to the court on February 1, 1980, along with cross-motions for summary judgment. Reply briefs would be due within ten (10) days. The parties agreed that this method of handling the case meant that the motion for a temporary restraining order was withdrawn, and the court *could* consolidate the preliminary and permanent injunction motions and issue one final order in the case. The possibility of an evidentiary hearing was *not* foreclosed provided that the party seeking the hearing could demonstrate that it had lived up to its agreement to attempt to stipulate the facts.

The defendant landlord earlier in the course of the litigation agreed not to attempt to evict the named plaintiffs. However, as the plaintiffs' one-year leases expire, the landlord is not restrained from initiating dispossessory proceedings. After giving notice to the named plaintiffs, or if unable to reach the named plaintiffs after giving

notice to their counsel, the landlord may enter the apartments of the named plaintiffs to make repairs.

In its December 21 order, this court conditionally certified the class and defined it as follows:

> All GRFA Section 8 existing housing program participants who are renting a unit under the Section 8 program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process.

At the January 3 conference, the state and federal defendants expressed dissatisfaction with this definition of the class because it refers to "good cause" and "due process" which are the ultimate legal issues in the case. The plaintiffs also expressed dissatisfaction with this definition of the class because it refers to program participants who "are having their leases terminated." The number of tenants *presently* being evicted is a constantly changing number. Moreover, plaintiffs' view of the case is that the appropriate definition of the class encompasses tenants who have in the past been evicted or who may in the future be evicted as well as those currently being evicted without good cause and without adequate due process.

Plaintiffs indicated on January 3 that the requirement of numerosity has been the most difficult hurdle to cross in maintaining this case as a class action. The state defendants and plaintiffs agreed to stipulate from area administrative reports the number of landlord-initiated, mid-term lease terminations. The parties agreed that reports would be examined for a "reasonable time" in

the past and that the parties would attempt to reach a mutually acceptable definition of "reasonable time."

This agreement was accepted by the court and is hereby made the ORDER of the court. The agreement rendered moot all pending discovery motions including plaintiffs' motions for expedited discovery and to compel and defendants' motion for a protective order. Plaintiffs' motion for a temporary restraining order was withdrawn. Thus, only plaintiffs' motion for permanent class certification was left unresolved, and the possibility of an evidentiary hearing on the preliminary and permanent injunctions was left open.

Since the January 3 conference, plaintiffs have moved to amend their complaint by adding an additional party plaintiff, Betty Foster, pursuant to Fed. R. Civ.P. 15(a), 20 and 21. This motion is opposed by the state defendants. The proposed amended complaint alleges that Ms. Foster's Section 8 benefits were terminated by a GRFA employee who had determined that Ms. Foster's rental unit did not meet the quality standards for the Section 8 program. The original plaintiffs had alleged that GRFA followed neither HUD's regulations nor the statute which governs landlord-initiated, mid-term lease terminations. The attempt to amend the complaint would add a party plaintiff who had suffered a GRFA-initiated, not a landlord-initiated, mid-term lease termination. This additional party plaintiff does not present common issues of law or fact with the initial party plaintiffs. The additional plaintiff would inject wholly new legal and factual issues just prior to the time when plaintiffs and defendants had agreed to submit cross-motions for summary judgment. The motion to add a party plaintiff addresses itself to the discretion of the court and is DENIED.

The plaintiffs have also moved for an extension of time for discovery because "plaintiffs had anticipated eliciting facts to which the parties cannot stipulate from live testimony." This is the sole reason which plaintiffs have advanced in support of their motion, and the court assumes that plaintiffs mean that they had "anticipated eliciting facts from live testimony to which the parties cannot stipulate." The court had indicated at the conference of January 3, 1980, that it would not entertain further motions for discovery on either the issue of class certification or on the factual issues underlying the merits of the case unless the party could demonstrate why it had failed to reach agreement with opposing counsel. Because plaintiffs have not made this showing, their motion for an extension of time is hereby DENIED.

Plaintiffs have also filed a motion for the court to reconsider their agreement of January 3 and to reconsider the court's definition of the conditionally certified class. In an attempt to meet the valid objections of the plaintiffs and the defendants to the court's initial definition of the class, the conditional class certification is hereby altered, and the class redefined as follows:

> All GRFA Section 8 housing program participants who are renting, or who have rented a unit under the Section 8 program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice and who are having, or who have had, or who are threatened with, mid-term, landlord-initiated lease termination.

Plaintiffs have also asked that the court grant plaintiffs' outstanding motion to compel discovery and that the court withdraw its requirement that plaintiffs and

state defendants "stipulate class numerosity." These requests are DENIED. The agreement by the plaintiffs on January 3 rendered moot plaintiffs' motion to compel discovery. The court has not attempted to require plaintiffs and state defendants to stipulate the size of the conditionally certified class. Rather, the parties agreed that they would make a good faith attempt to stipulate the number of landlord-initiated, mid-term lease terminations, and that this number would serve as a basis for legal argument concerning the size and scope of the class without further need for class discovery. Because the court at this time is unable to determine whether or not plaintiffs and defendants have made a good faith effort to determine the number of landlord-initiated, mid-term lease terminations, the motion is DENIED; however, the plaintiffs may renew their motion later.

The state defendants have moved the court for additional time in which to respond to plaintiffs' motion for reconsideration of the conditional class certification and the cross-motion for summary judgment. The motion is DENIED. The court refuses to alter the schedule to which the parties agreed concerning cross-motions for summary judgment and reply briefs. The court notes that the redefinition of the class conditionally certified by the court has taken into account the defendants' objections voiced at the January 3 conference. The court does not wish to foreclose the defendants from responding to this redefinition. If the defendants move the court to reconsider the definition of the conditionally certified class ordered today, the court will then entertain a motion for an extension of time.

To summarize, the agreement of the parties made on January 3, 1980, is made the order of the court. This

agreement and order moots plaintiffs' motions for expedited discovery and to compel and defendants' motion for a protective order. Plaintiffs' motion for a temporary restraining order was withdrawn. Plaintiffs' motions for a preliminary injunction and for permanent class certification are pending. Plaintiffs' subsequent motions to extend discovery and to amend their complaint are DENIED. Plaintiffs' motion for reconsideration of the conditional class certification and of their January 3 agreement is GRANTED in part and DENIED in part. Defendants' motion for an extension of time is DENIED with leave to refile.

IT IS SO ORDERED this 28 day of January, 1980.

/s/ ROBERT H. HALL

ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed in Clerk's Office, U.S.D.C. – Atlanta, December 21, 1979, Ben H. Carter, Clerk; By JW, Deputy Clerk]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHERINE JEFFRIES, ROSE HECTOR, EDDIE MAUDE FRANKLIN and BELINDA CLARKE, on behalf of themselves and all others similarly situated, *Plaintiffs*, vs. GEORGIA RESIDENTIAL FINANCE AUTHORITY; et al. *Defendants.*	CIVIL ACTION NO. C79-1349A

ORDER

This civil rights action for declaratory and injunctive relief for alleged violations of the Housing and Community Development Act, 42 U.S.C. § 1437f, is currently before the court on plaintiffs' motions for conditional class certification pursuant to Rule 23(c)(1), Fed.R.Civ.P., and for leave to amend their complaint, Rule 15, Fed.R.Civ.P. Plaintiffs and defendants have also submitted several motions relating to discovery, but these motions will not be ruled upon until a conference is held with the parties.

Plaintiffs are participants in a federally financed program under which they are assisted in making payments on rental housing that they occupy. Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f, authorizes the Department of Housing and Urban Development (HUD) to make these so-called

Housing Assistance Payments to public housing agencies such as defendant Georgia Residential Finance Authority (GRFA), which agencies in turn make payments to owners of housing units who have contracted to provide housing for program participants.

More specifically, section 8 as implemented by regulations promulgated by HUD, 24 CFR § 882, operates as follows. Low-income families that are eligible for participation in section 8 receive a Certificate of Family Participation. 24 CFR § 882.102. This certificate enables local public housing agencies to receive housing assistance monies from HUD, which the agencies in turn use to make payments directly to owners of private housing on behalf of program participants. Each section 8 participant must locate his or her own housing unit, 24 CFR § 882.103 (a), which the local public housing agency must certify as complying with HUD regulations. 24 CFR § 882-109. The owner of the dwelling unit and the local agency then enter into a payment assistance contract under which the local agency agrees to pay a part or all of the rent for the unit and the owner agrees to lease the unit to the program participant. 24 CFR § 882.102. Finally, the participant enters into a lease of the premises with the owner. The lease must meet the approval of the local agency and conform to the standards set forth in 24 CFR § 882 App. I and II, before Housing Assistance Payments to the owner can commence.

Plaintiffs as participants in the above-described program are presently leasing privately owned housing units and are beneficiaries of Housing Assistance Payments being made to the owners of those units. The leases under which plaintiffs occupy their housing units contain the following provision: "The Lease . . . may be terminated

upon 30 days advance written notice by either party." This provision appears in Standard Lease Form number 8-900-1 of the GRFA and conforms with 24 CFR § 882.107(b), which states in pertinent part: "The Lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party."

The owners of the housing units that plaintiffs occupy have now sought to terminate plaintiffs' leases pursuant to the above 30-day lease termination provision. Plaintiffs brought this suit for declaratory and injunctive relief and seek both as individuals and as representatives of the class of all participants in the GRFA section 8 program in Georgia to prohibit improper termination of Housing Assistance Payments. Plaintiffs attack the 30-day lease provision on several grounds. First, they claim that HUD's regulations governing termination are in direct conflict with 42 U.S.C. § 1437f(d)(1)(B)[1] and that furthermore GRFA does not even follow the procedures established by the allegedly void regulations. Second, plaintiffs allege that HUD has failed to enforce its regulations requiring local public housing agencies such as GRFA to establish a complaint and appeal procedure, thereby denying plaintiffs' right to due process under the fifth amendment. Finally, plaintiffs contend that program participants have a right to at least one year's occupancy under 42 U.S.C. § 1437f and 24 CFR § 882 and that the 30-day termination provision, absent a good cause requirement, violates this right.

1. Plaintiffs now move the court for conditional class

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[1] This section states in part: "[T]he agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy."

certification pursuant to Rule 23(c)(1), Fed.R.Civ.P., which provides in pertinent part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Plaintiffs define the class that they seek to represent as "[a]ll present and future GRFA Section 8 Existing Housing Program participants." *E.g.*, Plaintiffs' Response to State Defendants' Opposition to Plaintiffs' Motion for Conditional Class Certification, at 2. They have further proposed that a sub-class be defined as follows:

> All GRFA Section 8 Existing Housing Program participants who are renting a unit under the Section 8 Program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process. [*Id.*]

Both state and federal defendants have objected to conditional certification of plaintiffs' proposed class on the ground that plaintiffs have not satisfied the requirements of Rule 23(a), Fed.R.Civ.P.[3] Under Rule 23(a), the court may allow an action to proceed as a class action if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

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[3] Apparently neither group of defendants contests plaintiffs' allegation that their action falls within the scope of subsection (2) of Rule 23(b), which creates requirements for class action suits in addition to those imposed by Rule 23(a).

representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Although defendants raise some legitimate issues as to whether plaintiffs satisfy the requirements of Rule 23(a), the court concludes that the class should be tentatively certified so as to allow class discovery to commence. That class can now be best defined as follows:

> All GRFA Section 8 Existing Housing Program participants who are renting a unit under the Section 8 Program pursuant to a standard form lease provided to the landlords by GRFA for a minimum term of one year which contains a clause that the lease may be terminated on thirty (30) days notice, and who are having their leases terminated, prior to the expiration of the term, without good cause and without adequate due process.

Further discovery should produce the necessary facts upon which the court can determine the existence and scope of the class and whether injunctive and declaratory relief is appropriate for the class as a whole. *See Scott v. Parham*, 69 FRD 324 (N.D.Ga. 1975) (Edenfield, J.). Accordingly, plaintiffs' motion for conditional class certification is hereby GRANTED.

2. Plaintiffs next move to amend their complaint, Rule 15(a), Fed.R.Civ.P. Inasmuch as this motion has not been opposed and the court finds that justice will best be served by granting leave to amend, plaintiffs' motion for leave to amend their complaint is hereby GRANTED.

So ORDERED, this 21 day of December, 1979.

/s/ ROBERT H. HALL
ROBERT H. HALL
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7389

D.C. Docket No. C79-1349A

KATHERINE JEFFRIES, EL AL.,
Plaintiffs-Appellees,

versus

GEORGIA RESIDENTIAL FINANCE AUTHORITY, HARRIET J. MACKLIN, ETC.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 14, 1982

ISSUED AS MANDATE: AUG. 5, 1982

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*Honorable Joe Ingraham, Circuit Judge for the U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

Office - Supreme Court, U.S.
FILED
OCT 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL.,

Petitioners,

v.

KATHERINE JEFFRIES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THIS COURT BOUND BY THE LAW AT THE TIME OF DECISION, WHERE THE STATUTORY PROVISIONS AND REGULATIONS RELIED UPON BY PETITIONERS HAVE BEEN AMENDED, DELETING ANY ARGUABLE AUTHORITY FOR THEIR POSITION?

II. WHETHER STATE ACTION EXISTS WHEN A STATUTORILY - CREATED INSTRUMENTALITY OF THE STATE, PETITIONER GEORGIA RESIDENTIAL FINANCE AUTHORITY, TERMINATES SECTION 8 EXISTING HOUSING PROGRAM TENANTS' TENANCIES MID-TERM PURSUANT TO THE SECTION 8 STATUTE AND HAS A PERVASIVE ROLE IN EVERY OTHER ASPECT OF THE PROGRAM ADMINISTRATION?

III. WHETHER LOW INCOME TENANTS' LEGITIMATE EXPECTATION OF CONTINUED RECEIPT OF THEIR SECTION 8 EXISTING HOUSING PROGRAM BENEFITS, INCLUDING OCCUPANCY IN A DECENT, SAFE, AND HABITABLE RENTAL UNIT AND RENT AND UTILITY SUBSIDIES FOR THE TWELVE MONTH TERM OF THEIR LEASE AND HOUSING ASSISTANCE PAYMENT CONTRACTS, ARE PROPERTY RIGHTS TO WHICH THE DUE PROCESS RIGHTS OF THE FOURTEENTH AMENDMENT, INCLUDING GOOD CAUSE FOR MID-TERM TERMINATION, ATTACH?

IV. WHETHER CERTIFICATION OF A DEFENDANT CLASS OF SECTION 8 LANDLORDS IS REQUIRED BECAUSE THERE IS A PROPERLY CERTIFIED CLASS OF TENANTS CHALLENGING A NATIONAL REGULATION, AND

PROGRAMMATIC RULES AND DOCUMENTS UTILIZED NATIONALLY PURSUANT TO SAID REGULATION, AND WHERE THERE IS ONE NAMED LANDLORD WHO WAS AN ACTIVE LITIGANT IN THE ACTION?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL.,

Petitioners,

v.

KATHERINE JEFFRIES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Katherine Jeffries, Rose Hector, Eddie Maude Franklin, and Belinda Clarke, on behalf of themselves and all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 678 F.2d 919.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the constitutional, statutory, and regulatory provisions set out in pages 2-4 of the petitioners' brief, the following authorities are pertinent to this case:

42 U.S.C. § 1437f(d)(1)(B) (as amended October 1, 1981):

(B)(i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the Secretary, and

(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

24 C.F.R. § 882.107 (as amended, August 3, 1982, 47 Fed. Reg., No. 149, p. 33500):

§ 882.107 TERM OF ACC, HOUSING ASSISTANCE PAYMENTS CONTRACT AND ASSISTED LEASE.

(a) *Term of ACC.* The term of the ACC shall be for five years.

(b) *Term of Housing Assistance Payments Contract.* The PHA and the Owner shall agree on the term of the Contract with respect to the unit. The term shall not be less than one year, nor more than three years. The term of the Contract may in no case extend beyond the remaining term of the ACC.

(c) *Assisted Lease.* (1) The term of the Assisted Lease shall begin on the first day of the term of the Contract and shall end on the last day of the term of the Contract.

(2) The housing assistance payments shall end at the end of the Contract term, or upon a prior termination of the Contract, even if the Family continues in occupancy of the unit.

(3) If the Family and the Owner wish to enter into a new Assisted Lease for an additional term for the same unit or another unit, prior PHA approval must be obtained. Upon PHA approval in accordance

with the regulations, a new tenancy will be created by execution of a new Contract in accordance with paragraph (b) of this section and a new Assisted Lease in accordance with this paragraph (c).

24 C.F.R. §§ 882.215 (as amended, August 3, 1982, 47 Fed. Reg., No. 149, p. 33500):

§ 882.215 EVICTION

(a) *For leases entered into before October 1, 1981:*

(1) The PHA shall have the sole right to give the Notice to Vacate, with the Owner having the right to make representation to the PHA for termination of tenancy.

(2) The PHA shall give the Notice to Vacate unless it finds that the grounds for eviction as stated in the Owner's representation are not sufficient under the Assisted Lease.

(b) *For leases entered into on or after October 1, 1981:* The Contract and the Assisted Lease shall provide with respect to the unit that the Owner shall neither (i) terminate the tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Family, unless the Owner decides not to enter into a new Contract with respect to the unit, except for:

(1) Serious or repeated violation of the terms and conditions of the Lease;

(2) Violation of applicable Federal, State and local laws; or

(3) Other good cause.

7. Paragraph "e" of Appendix I—Required Lease Provisions, which follows § 882.218, is revised to read as follows:

e. The Lessor shall neither (i) terminate the

tenancy during the term of the Contract and Assisted Lease, nor (ii) refuse to enter into a new Assisted Lease with the Lessee, unless the Lessor decides not to enter into a new Contract with respect to the unit except for:

(1) Serious or repeated violations of the terms and conditions of the Lease;

(2) Violation of applicable Federal, State or local laws; or

(3) Other good cause.

STATEMENT OF THE CASE

Respondents filed this action challenging a federal regulation, 24 C.F.R. § 882.215, as void for conflict with its implementing statute at 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment. This regulation prescribed the procedures for evicting a tenant who receives benefits under the Section 8 Existing Housing Assistance Payments Program. Respondents argued that the regulation permitted a private landlord unilaterally to terminate their leases, and rent and utility subsidies. In fatal contrast, the statute required that the Public Housing Authority (PHA), petitioner Georgia Residential Finance Authority (hereinafter "GRFA") herein, respond to a landlord's request to terminate a tenant's tenancy and decide whether to issue a notice to vacate to the tenant. Transmittal of a notice to vacate, or demand for possession, is a jurisdictional prerequisite for initiating a state court dispossessory action in Georgia, and most states. Ga. Code § 61-301. Thus, under the statute, prior to its amendment, the PHA had the operative duty to prevent arbitrary evictions.

The district court ruled for the plaintiffs, striking 24 C.F.R. § 882.215 as void because of its conflict with

the statute. In addition, the district court found that "good cause" was required prior to any mid-term termination because the respondents' Section 8 benefits are property interests protected by the Constitution. *Jeffries v. Georgia Residential Finance Authority*, 503 F. Supp. 610 (N.D. Ga. 1980). The Court of Appeals affirmed at 678 F.2d 919 (11th Cir. 1982).

The petitioners did not appeal the lower court's finding that the HUD regulation is void. This was the pivotal argument in respondents' case below and is important in understanding the other arguments.

The relevant statutory section has been substantially amended to explicitly prohibit mid-term termination of Section 8 benefits without "good cause," but to permit the private landlord to send the notice to vacate. Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, U.S. Code Congressional and Administrative News, 97th Congress, First Session (No. 7, September 1981), now codified at 42 U.S.C. § 1437f(d)(1)(B). On August 3, 1982, HUD published new regulations superseding the relevant eviction, 882.215, and lease term, 882.107(b), regulations. Federal Register, Vol. 47, No. 149, pp. 33497-500.

Pursuant to the district court's final order, all lease provisions providing for termination on thirty days notice without cause were struck down as null and void. If petitioners' leases and practices were changed pursuant to the district court's order, entered December 22, 1980, by January 1, 1982, there should be no GRFA Section 8 tenants in Georgia with leases that permit mid-term termination without "good cause," because the GRFA leases are for a one-year term. Hence, the 30 day at-will termination clause utilized by GRFA, and defended in this petition,

has been found impermissible by both the district court, the United States Court of Appeals for the Eleventh Circuit, and Congress. Even if petitioners did not alter their leases until the statutory amendment of October 1, 1981, still by October 1, 1982 no one in the class, other than the speculative members suggested by petitioners, should have leases which the petitioners seek to have reviewed in this appeal.

REASONS FOR DENYING THE WRIT

1. THIS COURT IS BOUND BY THE LAW AT THE TIME OF DECISION. THE STATUTORY PROVISIONS AND REGULATIONS RELIED UPON BY PETITIONERS HAVE BEEN AMENDED, DELETING ANY ARGUABLE AUTHORITY FOR THEIR POSITION.

As originally pleaded, this action involved construction of a statutory provision, 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment, set out on page 2 of petitioners' brief, before amendment, regarding eviction procedures for a HUD-subsidized and-regulated housing program which is administered on a day-to-day basis by a State of Georgia authority, Georgia Residential Finance Authority. This statutory provision formed the basis of both the district courts and the appellate court's finding that respondents had a cognizable property right in their tenancy, and that sufficient state action existed to require procedural and substantive safeguards prior to termination of a one-year lease, in the middle of the lease term.

This statute and its implementing regulations have been amended and completely superseded by the new provisions, set forth *in toto* at pp. 2-4, *supra*.

The underlying theory of the case, and the opinions below, was that Congress, in 42 U.S.C. § 1437f(d)(1)(B),

prior to its amendment, had created a mandatory duty on public housing authorities, in this case the State of Georgia acting by and through the respondent GRFA, to control unilateral, arbitrary evictions by the participating private landlords. The means by which GRFA was to control this was by being vested with the duty to transmit the notice to vacate to the tenant. In Georgia, as well as most states, transmission of the notice to vacate is a jurisdictional prerequisite to filing a state court dispossessory action. Georgia Code § 61-301.

The courts below found that because the State of Georgia had to perform the crucial step of sending the notice to vacate, it could not act arbitrarily, and thus would be required to make a factual inquiry, weigh the credibility of the parties and the reason the landlord was seeking to evict the tenant. Moreover, to make such a fact-finding review meaningful, substantive, defined as "good cause", and procedural due process safeguards are necessary.

The HUD regulation, 24 C.F.R. § 882.215 (1979),[1]

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[1] § 882.215 EVICTION.

The Owner shall not evict any Family unless the Owner complies with the requirements of local law, if any, and of this section. The Owner shall give the Family a written notice of the proposed eviction, stating the grounds and advising the Family that it has 10 days (or such greater number, if any, that may be required by local law) within which to respond to the Owner. The Owner must obtain the PHA's authorization for an eviction; accordingly, a copy of the notice shall be furnished simultaneously to the PHA, and the notice shall also state that the Family may, within the same period, present its objections to the PHA in writing or in person. The PHA shall forthwith examine the grounds for eviction and shall authorize the eviction unless it finds the grounds to be insufficient under the Lease. The PHA shall notify the Owner and the Family of its determination within 20 days of the date of the notice to the Family, whether or not the Family has presented objections to the PHA. If the Owner has not received a response from the PHA within 20 days, he shall

which prior to its amendment was challenged and found invalid, created a mere ministerial role for GRFA whereby it could only acquiesce in any landlord decision regarding evictions. Significantly, the 30-day clause in the lease was originally drafted pursuant to the regulation which was held void and illegal by the courts below. The petitioners did not appeal the decision below striking the relevant regulation. Moreover, on August 3, 1982, HUD published a new § 882.215 to conform with the new statute, and specifically prohibited 30-day termination clauses, or any lease term less than one year.

In their petition, the petitioners continue to argue the validity of the 30-day termination clause which permits mid-term evictions without cause and creates a diluted, ministerial role for GRFA to play in a threatened eviction. 24 C.F.R. § 882.107 has been specifically amended to require a minimum one year lease term and to delete its prior dispensation for a 30-day termination clause.

The underlying statute was amended on October 1, 1981, deleting the requirement that the state send the notice to vacate but explicitly requiring that the private landlords prove good cause in state court before being permitted to evict a Section 8 Existing Program tenant. HUD was a party in the district court proceedings and withdrew from the appeal proceedings before filing a brief in the Eleventh Circuit Court of Appeals because of this amendment to the relevant statute. This Court is bound by the law at the time of its decision. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281-282 (1969). The authority upon which petitioners rely has been amended; and thus, this Court must deny the writ.

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telephone the PHA and shall be informed by the PHA whether a notice of determination has been mailed. If the PHA informs the Owner that no notice has been mailed within the 20 day period, the PHA shall be deemed to have authorized the eviction.

2. RESPONDENTS' INTERESTS IN THEIR SECTION 8 LEASES, RENT AND UTILITY SUBSIDIES ARE PROTECTABLE PROPERTY INTERESTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners' first argument in support of their contention that their writ should be granted is that the court of appeals' finding that respondents have protectable property interests in continued occupancy for the term of their one-year leases comprises an unsupportable expansion of this Court's precedents. For the purpose of responding to the petitioners' argument, respondents will limit their discussion of the radical amendment of the relevant statute on October 1, 1981, because petitioners' argument completely ignores this statutory amendment. However, respondents incorporate by reference their discussion of the current law, at pp. 6-8, *supra*.

The authority for petitioners' argument against finding a property interest for the one-year term of the lease is the statute at 42 U.S.C. § 1437f(d)(2). This provision permits lease terms at any increment between one (1) month and one hundred and eighty (180) months. Petitioners' argument ignores the fact that they have chosen to utilize twelve month leases. Moreover, all of the other program documents executed between GRFA and the landlord (the Housing Assistance Payments Contract), between GRFA and HUD (the Annual Contributions Contract), and between GRFA and the tenant (Certificate of Family Participation) are required to be in existence for the term of the lease, and no less than one year nor more than three years. 24 C.F.R. §§ 882.107(b); 882.108(b). The GRFA lease itself stated:

> . . . for a term commencing on . . . and ending on

> . . . at midnight. (*The lease shall be for not less than one year nor more than three years*, but may be terminated upon 30 days advance written notice by either party). (emphasis added)

Although the issue in this action was whether Section 8 Existing tenants had a property right in occupancy for the lease term, the United States Court of Appeals for the Fourth Circuit recently found that a Section 8 Existing tenant has a property right in continued occupancy beyond the term of the lease. *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982).

The importance of the lease term in finding a property right is established by 42 U.S.C. § 1437f(C)(2)(c)(4). A tenant must be residing in a rental unit pursuant to a GRFA one-year lease before he or she will receive the benefits of the Program, *i.e.*, occupancy in a decent and habitable dwelling for the term of the lease at a set percentage of the family's income, and rent and utility subsidies. Thus, execution of the lease is the act which confers the program benefits.

The petitioners also urge that 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment, permitted the landlord to terminate a lease mid-term without cause. This section provided:

> the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy.

This section pertained to evictions. It afforded the right to the owner to "make representation to the agency for termination of tenancy." It did not give the owner the right to terminate a lease mid-term. This section simply permitted a landlord to notify GRFA that he wished to

terminate a family's tenancy or commence an eviction action.

On page 11 of their brief, petitioners rely on a carefully edited excerpt from 24 C.F.R. § 882.107(b) (1979) and their misreading of § 1437f(d)(2) (1979) to justify the summary termination of respondents' rent and utility subsidies, without notice to these tenants, and solely on request of the landlord. 24 C.F.R. § 882.107(b) stated, in pertinent part, prior to its amendment,

> . . . [t]he term of the Contract shall be for the term of the Lease; Provided, that *if a Family continues in occupancy after the expiration of the term* on the same terms and conditions as the original Lease (or changes thereto which have been approved by the PHA and incorporated in *the Contract shall continue in effect for the duration of such tenancy* . . . [emphasis supplied].

This regulation provides for housing assistance payments to be continued after the lease has expired, or after the 12 month term. It has no relevancy to a mid-term termination situation.

On page 12 of its brief, GRFA cites to HUD's alleged encouragement to employ a 30-day clause in Section 8 leases, in HUD Notice H-77-13 (PHA) issued on April 20, 1977. (Record, pp. 2983-3004). This notice expired on October 20, 1977. (Record, p. 2983). It was issued when the Section 8 Program was just commencing in most states and comprised guidance to PHAs who were initiating their Section 8 Existing Housing Programs and having difficulty convincing landlords to participate. The GRFA Section 8 Program has been fully leased since Fall 1978. This HUD suggestion expired by its own terms over five years ago and has no persuasive value.

More significantly, petitioner argues that the Court

should give deference to HUD's implementation of a statute by regulation, but utterly fails to mention the interim rule, published August 3, 1982, to replace the void 24 C.F.R. §§ 882.215, 882.107, and 882.108. Federal Register, Vol. 47, No. 149, pp. 33497-500. As the preamble to the new regulations recognizes,

> [u]nder the 1981 amendments, the statute now for the first time directly controls the term of the assisted lease: "The lease . . . shall be for at least one year or the term of [the assistance] contract, whichever is shorter. . . .

Accordingly, 24 C.F.R. § 882-107(b), upon which petitioners rely, has been amended to state: "[t]he term shall not be less than one year nor more than three years." The prior regulatory authority, although void for conflict with the prior 42 U.S.C. § 1437f(d)(1)(B), by permitting a thirty (30) day termination clause, has been totally removed from the Section 8 regulations.

In footnote 6 of their brief, petitioners misconstrue Georgia law. Although the commentators recognize that a lease in the private rental market where there is mutuality of bargaining power, may contain a mid-term termination clause which may be invoked without cause, such a clause must be "strictly construed." Pindar, *Georgia Real Estate Law*, § 11-35 (2d Ed. 1978). Further,

> [p]redictably, provisions of this nature allowing a landlord to unilaterally terminate a lease are not favored by the courts. In cases of doubt such clauses are construed against working a forfeiture and in favor of the tenant. W. Dawkins, *Landlord and Tenant, Breach and Remedies: The Law in Georgia*, § 5-4 (1979).

The contractual mutuality referred to does not exist in the context of a program which provides an equivalent of as much as 50% of a family's income, as in the case of the

named respondents.

On page 13 of their brief, petitioners assert that the court of appeals' opinion conflicts with this Court's analysis in *O'Bannon v. Town Court Nursing Center*, 100 S.Ct. 2467 (1980). In fact, this Court's reasoning in *O'Bannon* fully supports the respondents' contentions.

The question raised in *O'Bannon* was whether a nursing home patient had a sufficient property interest in residing in a specific nursing home to justify a hearing before an agency could revoke the home's certification as a qualified facility under the Medicaid Program. The decertification of the facility occurs when the governmental agency, which transfers Medicaid funds to the home as reimbursement for housing and caring for Medicaid patients, ascertains that the home does not meet minimum health and safety standards under federal regulations. The corresponding situation in the Section 8 context would arise when GRFA inspects a home in which a Section 8 certificate holder wants to enter a lease and reside as a Section 8 tenant and GRFA determines that the house fails to meet HUD's minimum property standards as not being decent, safe, and sanitary.

In *O'Bannon*, this Court held that the Medicaid statute gives patients the right to choose from a choice of qualified nursing homes:

> . . . 42 U.S.C. § 1396(a)(23) gives recipients the right to choose among a range of *qualified* providers, without governmental interference. *By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified.*

100 S. Ct. 2467. [emphasis added].

This Court goes on to decide that Medicaid patients in

nursing homes have two types of benefits, direct and indirect. Direct benefits include the financial payments made to the home on the patients' behalf. An indirect benefit, or an incidental result of the Program, is that the government will impose and enforce minimum standards of care on facilities like Town Court. 100 S. Ct. at 2476. Thus, the rights being affected in the revocation of a nursing home's certification arise from an agreement between the home and the government. This corresponds to the Housing Assistance Payments Contract executed between GRFA and a Section 8 landlord. Like the nursing home in *O'Bannon*, it is the Section 8 landlord who has the right to challenge a GRFA determination that his home fails to meet minimum property standards.

Justice Blackmun's concurrence in *O'Bannon* succinctly sets out the aspects of that case which distinguish it from the present action. Justice Blackmun recognized that

> the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits. The Constitution would not have entitled John Kelly to a fair hearing if New York had chosen to disband its public assistance programs rather than to cut off his particular award. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Nor would Texas have had to afford process to Professor Sindermann had it decided for budgetary reasons to close Odessa Junior College. See *Perry v. Sindermann*, 408 U.S. 593 (1972) . . . These observations comport with common understandings and shared expectations.

100 S. Ct. at 2482.

Furthermore,

> the case for due process protection grows stronger as

> the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision-maker's purview. For when the government acts in a way that singles out identifiable individuals in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than being simply *dealt with*.' L. Tribe, *American Constitutional Law*, § 10-7, pp. 503-504 (1978) (emphasis in original).

100 S. Ct. at 2483. *Accord, Vitek v. Jones*, 445 U.S. 480 (1980).

Justice Blackmun applies Professor Tribe's conclusion to the *O'Bannon* facts and finds that "the patients' interest has been jeopardized not at all because of alleged short-comings on their part." Moreover, Justice Blackmun determines that when public benefits are subject to adverse action upon a finding of "fault, impropriety, or incompetence" of the recipients, the Supreme Court has not hesitated to require that a hearing be afforded the recipient. *Id.*

The language in the prior 42 U.S.C. § 1437f(d)(1)(B) was derived from years of evolving case law regarding the right of federally-assisted tenants under the Fourteenth Amendment to risk-reducing procedures when threatened with eviction or loss of some other public benefit.[1] Other Supreme Court decisions in various administrative con-

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[1] *Escalera v. New York City Housing Authority*, 425 F.2d 853, 861 (2d Cir. 1970), *cert. denied*, 400 U.S. 853; *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970); *McQueen v. Druker*, 317 F. Supp. 1122 (D. Mass. 1970); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Lopez v. Henry Phipps Plaza South, Inc.* 498 F.2d 937 (2d Cir. 1974); *Goldberg v. Kelly*, 379 U.S. 254 (1970).

texts support the respondents' argument that a person who is legally entitled by statute, rule, or understanding to continued receipt of governmental benefits for a specific term is entitled, by the Constitution, to a hearing which demonstrates the existence of specified reasons, or good cause, for any termination or reduction of benefits.[4]

Petitioners argue that the decisions below also conflict with *Flamm v. Real-Blt, Inc.*, 168 Mont. 351 (1975), *cert. denied*, 424 U.S. 1313 (1976). (Petitioners' Brief, p. 14). In *Flamm*, the Supreme Court of Montana found that an eviction by a private landlord receiving federal assistance, through mortgage insurance and rent subsidies, did not rise to the level of state action which would trigger the due process clause. Justice Rehnquist wrote a short opinion in response to the tenants' motion to stay the Supreme Court of Montana's decision, and certiorari was denied.

From the opinion in *Flamm*, it is impossible to discern in which federal program the landlord was participating. As the district court herein found, the present case is distinguishable from *Flamm* because "state action is explicitly required by the federal statute to effect an evic-

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[4] In *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), in the context of employment contracts the Court determined that where contract or statutory terms guaranteed continued employment the existence of "sufficient cause" for nonrenewal should be shown. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court stated that existence of cause must be shown where a federal employee was being discharged. In *Meachum v. Fano*, 427 U.S. 215 (1976), the Court required a showing of misconduct prior to a prisoner transfer to a less favorable confinement. Finally, in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), the Court held that a public utility company could not terminate service "at will" but only "for cause" because customers had a "legitimate claim of entitlement" to continued service. *Id.* at 7-11.

tion of a Section 8 tenant." *Jeffries*, 503 F.Supp. at 615. Whereas, in *Flamm* the private landlord acted alone to evict the tenant.

The district court was correct in finding Justice Rehnquist's terse opinion in *Flamm* inapposite. The respondents herein argue that the 30-day lease termination clause violates the Section 8 statute; therefore, this Court cannot avoid making a ruling on the presence of state actions as it could in *Flamm*.

3. STATE ACTION IS PRESENT WHEN A STATUTORILY - CREATED INSTRUMENTALITY OF THE STATE, PETITIONER GEORGIA RESIDENTIAL FINANCE AUTHORITY, TERMINATES SECTION 8 TENANTS' TENANCIES MIDTERM PURSUANT TO THE SECTION 8 STATUTE AND HAS A PERVASIVE ROLE IN EVERY OTHER ASPECT OF THE PROGRAM ADMINISTRATION.

In order for Fourteenth Amendment due process protections to attach, state action must be present. This is a determination that the government is sufficiently involved with the activity that causes the injury. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The due process clause of the Fourteenth Amendment applies to and restricts only state government, not purely private parties. *See, Public Utilities Commission of D. C. v. Pollack*, 343 U.S. 451, 461 (1952). Petitioner GRFA is an arm of state government created by state law, Georgia Code § 99-3602, and is identified as a "public body" and "an instrumentality of the State of Georgia." Ga. Code § 99-3604.

The state action requirement is met in several ways. The State, through its instrumentality GRFA, has a role

in the operation and management of the Section 8 Existing Program which pervades every aspect of the Program. The Authority determines the eligibility of individual families for participation in the program. 24 C.F.R. § 882.209. GRFA also explains the program details to each family, both orally and through an information package which it has prepared, 24 C.F.R. § 882.209, and helps individual families locate dwelling units which meet the proper housing standards, 24 C.F.R. § 882.103. The Authority has drafted the lease which landlords must use in order to participate in the program. GRFA ascertains which landlords may participate by inspecting and approving, or rejecting, a given rental unit. 24 C.F.R. § 882.210(d).

There is a direct financial relationship between GRFA and the landlords through the Housing Assistance Payments Contract, pursuant to which the landlords receive the subsidized portion of the rent. 24 C.F.R. § 882.105. The Authority also pays Section 8 landlords for some unpaid rent and damages. 24 C.F.R. §§ 882.106 and 882.108. GRFA must certify in each instance that rents are "reasonable" before approving a lease. 24 C.F.R. § 882.106. GRFA re-audits tenants to ascertain continued eligibility at least annually. GRFA transmits the rental assistance monthly to participating landlords and sends direct utility subsidies to the tenants. For other GRFA duties see 24 C.F.R. § 882.116, generally. Specific to this case, the statute in question, prior to its amendment, required an instrumentality of the State of Georgia to issue the legally operative document, the notice to vacate, to initiate state court evictions. Unless, and until, the State of Georgia transmits a notice to vacate, the landlord cannot invoke the judicial authority of the state to dispossess a tenant.

The petitioners rely on *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974). *Jackson* is inapposite because therein the state's only involvement was to approve a termination plan. In the present case, the state, after review, performs the legally operative step which initiates the eviction process in each particular case.

In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the Supreme Court found an absence of state action. The Supreme Court framed the issue as follows:

> [t]he question presented by this case is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7-210, is an action properly attributable to the State of New York (footnote omitted).

436 U.S. at 151.

In *Flagg Brothers*, there was absolutely no action by the State of New York, other than passing the State Uniform Commercial Code. Conversely, in the case at bar the private landlord could not take action to evict a tenant until the State has held a hearing, reached a decision, and issued a notice to vacate. The private landlord can only make representation for termination of the tenancy. 42 U.S.C. § 1437f(d)(1)(B), prior to its amendment. GRFA then processes and approves, or rejects, the request. The State of Georgia is the primary decision-maker, retaining veto power over the private party who wishes to terminate a tenant's occupancy midterm, and which similarly must take the affirmative step which is the jurisdictional prerequisite to legal eviction.

All defendant parties in this case, except the landlord, were public officials. Thus, the case is clearly distinguished from *Flagg Brothers*, 436 U.S. at 157, where the pivotal

factor was the total absence of overt official involvement. This distinguishes *Flagg Brothers* from earlier decisions which imposed procedural restrictions on creditors' remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The inquiry in *Flagg Brothers* concerned whether or not the action was that of the sovereign. Here it is. The government, in performance of the Authority's essential governmental functions by sending the notice to vacate, has acted. *See, Burton v. Wilmington Parking Authority*, 365 U.S. at 723.

4. GRFA SECTION 8 LANDLORDS ARE NOT INDISPENSABLE PARTIES UNDER RULE 19.

In its final argument, petitioner GRFA argues that the Section 8 landlords who correspond to the individual tenant members of the plaintiffs' certified class should have been joined as a defendant class. Further, petitioners assert that this defendant class is an indispensable party under Federal Rule of Civil Procedure 19. Finally, petitioners maintain that the district court's failure to join this defendant class somehow makes the certification of respondents' class invalid under Federal Rule of Civil Procedure 23. The petitioners' discussion once again ignores the fact that HUD regulations now bar the utilization of thirty-day termination clauses. Further, the petitioners continue to press this claim on behalf of a class of private parties who have not sought, at any time, to join this litigation. Of course, respondents' landlord, Russell Taptich, was a party below.

The absent Section 8 landlords herein are not indispensable parties. They are provided preprinted contracts, leases, and instructions from the State and Federal defen-

dants. These landlords do not have any choice or bargaining power with respect to the operations of the Program or the terms of the contracts and leases.

Resolution of the issues in this case will be binding on the individual landlords through the lease, contracts, instructions, and regulations which they are provided from petitioner GRFA and HUD. Because the Section 8 landlords have no latitude within which to modify the rules and operations of a federally-created, state-operated rent and utility subsidy program, their joinder is not necessary to a complete and final adjudication on the merits. The challenged regulations, practices, and policies are either illegal or they are not. The participating landlords' obligations and rights will have to comply uniformly with the Court's findings on these questions.

On page 19 of their brief, petitioners cite several cases in support of their argument that when litigation affects contractual rights, all parties to the instrument are necessary parties. However, each of these cases is inapposite because in each the parties in issue actually participated in drafting the terms of the disputed contracts. *Neal v. System Board of Adjustment*, 348 F.2d 722 (8th Cir. 1965) [Challenge to contract term negotiated by the union makes the union a necessary party because of the adjustment to a collective bargaining agreement.]; *Commonwealth Trust Co. of Pittsburgh v. Smith*, 266 U.S. 1521 (1924); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), and *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978) [Involve leases drafted by the signatories and an action by another individual or group to set aside the contract]. In *Neal*, there is dictum regarding indispensable parties which was written prior to the radical revision of Rule 19 in 1966 which emphasized a more pragmatic

approach to indispensable parties.

These cases are not relevant to the issue at bar. The GRFA Section 8 landlords do not have any negotiating power with respect to the terms of the Section 8 leases and the HUD Housing Assistance Payments Contract. These are standard form leases provided by petitioner GRFA. Further, the Housing Assistance Payments Contract executed by the Section 8 landlords is a HUD form provided to the landlord and GRFA. The terms of this contract are not negotiable.

The petitioners' expressed concern in urging this position of joinder of a defendant class is that a decision in favor of the respondents would impair the landlords' abilities to protect their own interests and leave the petitioners with inconsistent obligations. This concern is groundless because of the nature of respondents' claims. Respondents challenged federal and state agencies' policies, practices, and acts as illegal under the United States Housing Act and the Fifth and Fourteenth Amendments of the United States Constitution. Thus, should the respondents prevail, the landlords would not be able to argue for the inequity of declaring invalid an unlawful agreement. *Smith v. B & O Railroad Co.*, 473 F.Supp. 572, 584 (D. Md. 1979): "There can be no vested interest in an unlawful practice." Conversely, should the respondents lose, the contested Section 8 practices and policies will continue and the Section 8 landlords, so argue the petitioners, will not be adversely affected.

Although considerations of judicial economy, double exposure of parties to liability, and judicial manageability are relevant, at the heart of the subject is the principle that whenever possible, the interests of any adversely affected party should be represented. The simple conten-

tion of respondents in the case *sub judice* is that indeed those interests were represented by the defendant landlord, R. F. Taptich, as well as by petitioner GRFA. Notably, Mr. Taptich withdrew from the appeal and did not brief or argue in the court of appeals. The interests of the petitioners already party to this action, in fact, are co-extensive with those of any individuals who would be adversely affected by a judgment for respondents. Petitioner GRFA wishes to defend the legality of the 30-day termination clause without good cause and administrative due process requirements. The defendants all had, in the proceedings below, a mutual desire to retain the clause for administrative convenience; although their motives vary, they have an identity of interests. As has been previously discussed, even the regulatory basis of support for a 30-day termination clause has been deleted. 24 C.F.R. § 882.107 (1982). For this Court to attempt to solicit or order the inclusion of other individuals to defend this action would add nothing of substance to the petitioners' position. Conversely, nothing is lost by nonjoinder of additional petitioners, for in their absence, their interests are identical to and being protected by the petitioners already before this Court.

CONCLUSION

For the foregoing reasons respondents respectfully request that this Court deny the writ.

Respectfully submitted,

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OCTOBER TERM, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, ET AL.,

Petitioners,

v.

KATHERINE JEFFRIES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' Brief in Opposition states that leases entered into between landlords and tenants participating in the Section 8 Existing Housing Assistance Payments Program administered by the Georgia Residential Finance Authority (hereinafter "GRFA") are for a one-year term. Thus Respondents contend that if GRFA altered its form leases to comply with the December 22, 1980 Order entered by the district court and the statutory amendment affecting post-October 1, 1981 leases, there should no longer be any GRFA leases containing the thirty day at-will termination clause. Respondents' Brief in Opposition, pp. 5 and 6.

As authorized by HUD Regulation 24 C.F.R. §882.107 (b), in effect at the time of the order of the district court, landlords and tenants participating in GRFA's Program entered into leases for varying terms of from one to three years, with a thirty day at-will termination provision. Record, pp. 547, 2971 and 2973A; October 31, 1979 Deposition of Harriet J. Macklin, pp. 9 and 14; Appellants' Reply Brief in the United States Court of Appeals for the Eleventh Circuit, p. 13. The Director of GRFA's Section 8 Existing Housing Program has represented to Petitioners' attorneys that at least one hundred multi-year leases entered into prior to December 22, 1980 (containing the thirty day at-will termination provision) are presently effective.

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